

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Robert Weiner

Subseries:

OA/ID Number: 12819

FolderID:

Folder Title:

Don't Ask / Don't Tell #2 [4]

Stack:

S

Row:

114

Section:

4

Shelf:

2

Position:

2

TIMOTHY R. McVEIGH,

v.

THE HONORABLE WILLIAM COHEN, et al.

Defendants.

CIV. ACTION NO. 1:98CV00116

The Government's position in this case is not only without merit but chilling in its implications for all users of online services (regardless of whether they are in the military) and for servicemembers subject to the "Don't Ask, Don't Tell, Don't Pursue" policy. Defendants would have this Court rule that the Government is free to obtain information from online service providers ("OSPs") without first obtaining the warrant, court order or user consent required by the Electronic Communications Privacy Act ("ECPA") and use that information against the user — the very person ECPA is designed to protect — with impunity. Defendants would also have this Court rule that the military can, with impunity, casually violate its own regulations concerning how investigations under the "Don't Ask, Don't Tell, Don't Pursue" policy are to be initiated and conducted. Condoning the Navy's conduct in this case would dramatically undermine the right to privacy in online communications guaranteed by ECPA and the confidence of military servicemen in the "Don't Ask, Don't Tell Policy."¹

Indeed, Professor Charles Moskos, author of the "Don't Ask, Don't Tell, Don't Pursue" policy, has opined in a Declaration in support of Mr. McVeigh's Motion for Temporary

(continued...)

Fortunately, however, Defendants misstate the law. Despite its inordinate length, the Government's Opposition to Senior Chief McVeigh's Motion for Temporary Restraining Order contains no meritorious argument why a TRO should not issue.² As Plaintiff is substantially likely to succeed on the merits and the "balance of hardships" favors delaying Senior Chief McVeigh's discharge from the Navy, the motion should be granted.

ARGUMENT

I. SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON HIS CLAIMS UNDER ECPA

Senior Chief McVeigh is likely to succeed on his direct cause of action under ECPA and none of Defendants' arguments to the contrary have merit:

A. Tucker: *Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996) misapprehends Congress' purpose in enacting 18 U.S.C. § 2703(c)(1)(B). That provision specifies the reciprocal obligations of the Government and online services providers to protect subscribers' privacy rights. The Fourth Circuit's hypertechnical reading of § 2703(c)(1)(B) in *Tucker* cannot be squared with the clear Congressional intent to define firm limitations on government access to the private information of subscribers to online services. Congress cannot have intended to prohibit online service providers from turning protected subscriber records over to the Government without a warrant, court order or consent and not also prohibit the Government from seeking that information illegally.

¹(...continued)

Restraining Order, which is attached as Exhibit A, that the Navy violated the policy in this case and that such wrongful enforcement by the military constitutes the single biggest threat to the efficacy of the policy.

² The length of Defendants' brief precludes a rebuttal here of each point the Government makes. Plaintiff has addressed here only Defendants' principal contentions concerning the merits and will stand on the points and authorities cited in its original memorandum and at oral argument for the remaining issues.

B. Aiding And Abetting: Even if *Tucker* were correct, Senior Chief McVeigh has filed an Amended Complaint alleging that the Government aided and abetted the ECPA violation of America Online ("AOL"). *Tucker* concedes that a claim for aiding and abetting an online service provider's violation of 18 U.S.C. § 2703(c)(1)(B) could state a cause of action. 83 F.3d at 693 n. 6.

C. Additional ECPA Violations: The Amended Complaint also alleges violations of two other provisions of ECPA, 18 U.S.C. §2703(a) and (b). These provisions were violated because the Government required AOL to disclose the contents of electronic communications — in this case, the e-mail Senior Chief McVeigh sent to AOL when he subscribed to America Online informing them of his full name and billing information without first obtaining a warrant, court order or Senior Chief McVeigh's consent. (Amended Complaint, ¶ 43). Again, even *Tucker* concedes that a direct cause of action under 18 U.S.C. § 2707 lies against the Government under these provisions.

D. There Was A "Knowing Violation": The Government's contention that there was no "knowing" violation of ECPA because Lt. Morean and Legalman Kaiser allegedly were unaware that seeking information from AOL without a warrant was illegal is specious. It is beyond cavil that the Navy cannot elevate its legal officers' ignorance of ECPA to a defense. *See, e.g., Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (good faith reliance on a mistake of law is not a defense under wiretapping statute). Lt. Morean and Legalman Kaiser knowingly contacted AOL and got them to divulge confidential information without a warrant, court order or consent. This is all ECPA requires for there to be a violation.

E. The Relief Sought Is Authorized: The Government's contention that ECPA does not authorize the injunctive relief sought here is similarly baseless. Both ECPA and the Fourth and Fifth Amendments authorize the equitable relief sought by Senior Chief McVeigh. The "Relief" provisions of ECPA in 18 U.S.C. § 2707(b) are quite broad and specifically authorize

“such preliminary and other equitable or declaratory relief as may be appropriate.” 18 U.S.C. § 2707(b). The Government cites no authority for its argument that this broad relief provision does not authorize the suppression of unlawfully-obtained evidence in a military proceeding. Moreover, the fact that the statute does not specifically mention ‘suppression’ and ‘reinstatement’ is irrelevant; the Court is specifically authorized to fashion whatever equitable remedy it deems appropriate. Indeed, the Fourth Amendment exclusionary rule itself was judicially-crafted and there is no legislative history to indicate that a injunction excluding the consideration of illegally obtained evidence is forbidden under ECPA.³

F. The Error Here Was Not Harmless By the Government’s Own Admission.

Defendants’ repeated contentions that the use of the illegally obtained information in Senior Chief McVeigh’s administrative hearing did not constitute prejudicial error are groundless on the very face of Defendants’ brief and the administrative record. As the Navy admits, Lt. Morean testified that she instructed Legalman Kaiser to “call AOL and find out could we actually connect this screen name and member name Tim living in Honolulu, Hawaii with a birth date December 31 to Senior Chief McVeigh.” (Def. Mem. 7) (emphasis added). Thus, by

³ Moreover, suppression of the illegally obtained evidence is available as a remedy for the violation of Senior Chief McVeigh’s Fourth Amendment rights. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court held that Fourth Amendment violations do not automatically result in suppression of evidence in such civil proceedings as deportation proceedings. See also *Garret v. Lehman*, 751 F.2d 997 (1985) (applying *Lopez-Mendoza* to military discharge proceedings for use of marijuana). However, where the balance of competing considerations favors application of the suppression rule, or where the violation is egregious, the evidence will be suppressed. *Lopez-Mendoza*, 468 U.S. at 1041 & 1050-51. In *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994), the Ninth Circuit defined the scope of egregious conduct sufficient to invoke the suppression doctrine in civil proceedings to encompass “bad-faith” violations, which it said occur whenever “evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution.” 22 F.3d at 1449-52. Accord *Orhorhahe v. INS*, 38 F.3d 488 (9th Cir. 1994) (targeting an individual for investigation based solely on a Nigerian-sounding name sufficiently-egregious to warrant application of exclusionary rule to civil proceeding). Senior Chief McVeigh alleges a deliberate violation of his Fourth Amendment privacy rights and thus fits within the exception to the *Lopez-Mendoza* rule.

Defendants' own admission, without the illegally obtained information, Lt. Morean could not make that connection and Senior Chief McVeigh's discharge could not have gone forward.

II. SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON HIS CLAIMS UNDER THE PROCEDURAL DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE ADMINISTRATIVE PROCEDURE ACT

The Government's Opposition fails to answer Senior Chief McVeigh's claims that the Navy's violation of ECPA and its own regulations under the "Don't Ask, Don't Tell, Don't Pursue Policy" deprived him of due process under the Fifth Amendment and constituted arbitrary and capricious agency action in violation of the APA.

A. The Navy Must Abide By Its Own Regulations: The Navy's violation of its own regulations in initiating its investigation of Senior Chief McVeigh rendered its decision to investigate and discharge him "arbitrary and capricious" in violation of the APA. "It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful The military departments enjoy no immunity from this proscription The logic of [the cases supporting this principle] derives from the self-evident proposition that the Government must obey its own laws." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). *See also Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("In cases in which procedural violations are alleged, the test or standards against which this court measures the military's conduct are inherent: they are the applicable statutes and regulations."). Having promulgated the particular regulations and guidelines at issue in this case, Defendants are bound to act in accordance with them or their actions are in violation of the APA. Defendants cite no authority to the contrary.

Moreover, Defendants' failure to abide by their own regulations in connection with a military discharge constitutes a violation of procedural due process. *See Kohn v. Laird*, 460 F.2d

1318, 1319 (7th Cir. 1992)(where Army suspended reservist from active duty without following procedural requirements set forth in Army's own administrative rules, Army violated reservist's due process rights, even though it granted a hearing); *Suro v. Llenz*, 551 F. Supp. 1094, 1101 (D.P.R. 1982)("the military department enjoys no immunity to ignore its own land and regulations" and violation of these laws and regulations will be a violation of due process).

B. Defendants' Irrelevant Contentions Concerning "Procedural Or Substantive Rights" Under The Guidelines: Defendants cite no authority for the proposition that the mere statement in the Guidelines that the regulations at issue create no "procedural or substantive rights" is of any significance in the context of a Fifth Amendment procedural due process or APA claim. Regardless of whether some sort of direct civil action is created by the Guidelines, the Navy cannot exempt itself from judicial review under the APA or the Fifth Amendment and promulgate Guidelines for implementing a Congressionally mandated policy without being required to follow them.

C. The Navy Does Not Substantively Challenge Plaintiffs' Fifth Amendment Claim: The Navy does not (because it cannot) contest the following elements of Senior Chief McVeigh's Due Process claim under The Fifth Amendment: (1) Senior Chief McVeigh has a property interest in his continued service in the Navy sufficient to warrant protection under Due Process. Complaint ¶ 66, and (2) the Navy solicited and obtained personal information concerning Senior Chief McVeigh from an online service provider without first obtaining a warrant, a court order or Mr. McVeigh's consent, as specified in the Electronic Communications Privacy Act ("ECPA"). Complaint ¶¶ 55-56, 58, 64(E), 68(E). Irrespective of whether this suffices to state direct causes of action under ECPA or the "Don't Ask, Don't Tell, Don't Pursue Policy," this admitted violation of the rules established by Congress regarding Government access to personal information held by online services providers unquestionably suffices to state a straightforward claim for violation of Senior Chief McVeigh's Due Process rights under the Fifth Amendment.

See Plaintiff's Memorandum at 6. These facts likewise establish a claim under the Administrative Procedure Act ("APA") for abuse of discretion and arbitrary and capricious behavior. The Government's Opposition does not challenge either of these arguments.

III. SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF HIS FOURTH AMENDMENT CLAIM

The Government raises two main arguments with respect to Senior Chief McVeigh's Fourth Amendment claim, neither of which presents an obstacle to relief:

A. There Is No Preemption Of Plaintiffs' Fourth Amendment Claim: First the Government argues that ECPA is a comprehensive regulatory scheme which displaces the Fourth Amendment. (Def. Mem at pp. 17-20). The nub of this argument is that the Court should not second-guess the decisions Congress made in ECPA regarding the government's obligation to respect individual subscribers' privacy rights. In addition to the obvious point that no statute can preempt the Constitution, this argument makes no sense in the present context. Unlike the plaintiff in *In re Askin*, 47 F.3d 100 (4th Cir.), cert. denied, 116 S. Ct. 382 (1995), Senior Chief McVeigh is not asking the Court to disregard the balance that Congress struck between privacy rights and government security, but rather to enforce it. Surely the Government is not serious in its implication (Def. Mem. p. 19) that ECPA authorizes the Government to obtain personal information from an online services provider without a warrant, court order, or subscriber consent.

B. There Was A Reasonable Expectation Of Privacy: Second, the Government erroneously argues that ECPA does not create a reasonable expectation of privacy in the material seized here. (Def. Mem. at pp. 19-21). The short answer to this argument is that the Senate Judiciary Committee Report on the Electronic Communications Privacy Act of 1986 (p. 5), attached at Exhibit B, explicitly states that it is intended to set the balance between the "privacy expectations of American citizens" and "the legitimate needs of law enforcement agencies." That

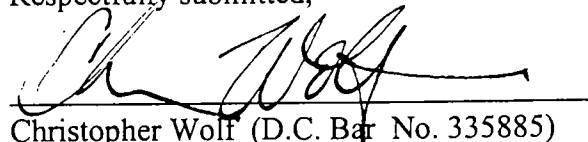
the obligation to obtain a warrant or court order applies only to government access does not undermine the legitimate expectation of privacy from unauthorized government access created by ECPA. Moreover, Defendant McVeigh's services contract with AOL created a reasonable expectation of privacy by providing that AOL would not divulge this information to anyone, government or otherwise, without a warrant, other court order or consent. (Amended Complaint, ¶¶ 41-43). Defendants' suggestion that this information was "freely accessible" without an illegal act by the Government and AOL is therefore without basis. But-for the Government's violations of ECPA and the Fourth and Fifth Amendments, there never would have been a hearing and there never would have been an admission of any kind that McVeigh was the author of the E-mail.

CONCLUSION

For the reasons stated above and in his moving memorandum, Senior Chief Petty Officer McVeigh respectfully requests the issuance of a Temporary Restraining Order.

Respectfully submitted,

By:



Christopher Wolf (D.C. Bar No. 335885)

Alec W. Farr (D.C. Bar No. 440046)

Amybeth García-Bokor (D.C. Bar No. 453279)

Jeffrey M. Lubell*

Eric Wechselblatt*

PROSKAUER ROSE LLP

1233 Twentieth Street, N.W.

Suite 800

Washington, D.C. 20036

(202) 416-6800

[* Not Admitted in D.D.C.]

Dated: January 21, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,	)	No. 1:98cv00116 (SS)
	)	
Plaintiff,	)	SUPPLEMENTAL MEMORANDUM
	)	OF DEFENDANTS IN
v.	)	OPPOSITION TO
	)	PLAINTIFF'S MOTIONS FOR
WILLIAM S. COHEN, Secretary of	)	TEMPORARY RESTRAINING
Defense, <u>et al.</u> ,	)	ORDER AND PRELIMINARY
	)	INJUNCTION
Defendants.	)	

At the hearing on January 21, 1998, the Court asked defendants' undersigned counsel what advice he would have given the Navy's paralegal, Legalman Kaiser, if undersigned counsel had been the JAG officer assigned to this case. Defendants reiterate that 18 U.S.C. § 2703(c) does not impose any obligations on the government. However, the Court's question might be interpreted as asking for a statement of Department of Justice ("DOJ") policy. Accordingly, this memorandum is submitted in supplementation of undersigned counsel's response.

Section 2703(c)(1)(B) states that "[a] provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber or customer of such service * * * to a governmental entity only when the governmental entity" obtains a warrant, subpoena, or the consent of the subscriber or customer. In this case, the telephone call that allegedly violated § 2703(c)(1)(B) was made on September 11 or 12, 1997. See Admin. Rec. 24, 30. In guidelines issued the following month, the Computer Crime & Intellectual Property Section ("CCIPS"), Criminal Division, DOJ,

noted that Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996), had held that "§ 2703(c) 'does not expressly proscribe any action by governmental entities or their employees. Rather, § 2703(c) only prohibits the action of [communications] providers'" CCIPS, "Supplement to Federal Guidelines for Searching and Seizing Computers" (October 1997) ("Guidelines") (Glass Decl. att.) at 26 (quoting Tucker, 83 F.3d at 692). In the same guidelines, however, CCIPS urged government agencies to go beyond the requirements of Tucker, stating that, "if the government is acting without the consent of the customer or subscriber, governmental entities must use some compulsory process to obtain subscriber or transactional information." Id. at 23.

Although CCIPS, as a matter of policy, has issued guidelines counseling that compulsory process be used, the issuance of the guidelines does not suggest that the conduct in this case was illegal. On the contrary, the guidelines expressly state that they are "not intended to create or confer any rights, privileges or benefits to anyone," and further state that they are "not intended to have the force of law or a United States Department of Justice directive." Guidelines at ii n.1. A fortiori, they are not binding on the Navy in administrative proceedings like those at issue here.

For these reasons -- and because the guidelines were not issued until after the events giving rise to this lawsuit had taken place -- the issuance of the guidelines in no way suggests that any statutory violation has occurred here, let alone that

plaintiff is entitled to injunctive relief. Plaintiff's motions for a TRO and for a preliminary injunction should be denied.

Dated: January 23, 1998

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney



VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 1998, a copy of the Supplemental Memorandum of Defendants in Opposition to Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction and the Declaration of David M. Glass was sent by fax and by first-class mail, postage prepaid, to:

Christopher Wolf, Esq.
Proskauer Rose LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396

David M. Glass

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, Secretary of
Defense, et al., -

Defendants.

No. 1:98CV00116 (SS)

DEFENDANTS' STATEMENT RE
STATUS CONFERENCE

By order dated and filed January 26, 1998, the Court directed the parties to "appear before this Court on January 29, 1998 at 10:00 in Courtroom 6 for a status conference, at which time a briefing schedule and date for a hearing on final injunctive relief will be determined." For the following reasons, defendants believe that a determination as to final injunctive relief should be made now, on the basis of the record as it presently exists.

This case challenges the validity of the administrative proceedings culminating in the "order discharging Senior Chief McVeigh" from the Navy. See, e.g., Am. Compl. prayer ¶ 1. Review of the discharge proceedings asks whether the decision of the Navy was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In applying this standard, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 132, 142 (1973); accord IMS, P.C. v. Alvarez, 129 F.3d 618, 624 (D.C. Cir. 1997); National Treasury Employees Union

v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992). If the decision of the agency "is not sustainable on the administrative record made, then the * * * decision must be vacated and the matter remanded to [the decision maker] for further consideration." Camp, 411 U.S. at 143. In the absence of evidence that the agency has given "a false reason" for its decision, discovery is inappropriate. See Treasury Employees, 786 F. Supp. at 1046. See also IMS, 129 F.3d at 624 (refusing to permit supplementation of the administrative record through the filing of affidavits).

In this case, the decision of the Navy to discharge plaintiff is based on an administrative record that includes a 101-page hearing transcript and 183 pages of exhibits. Admin. Rec. ("AR") 4-288. Because "the focal point for judicial review should be the administrative record already in existence," the Court ought not to permit supplementation of the record, e.g., through discovery. See Camp, 411 U.S. at 142.

With respect to the legal validity of the Navy's decision, defendants have presented their position fully, and the Court should rely on the briefs already filed, except as to the following issue. Moments before the hearing on plaintiff's motion for a preliminary injunction, defendants were served with an amended complaint in which plaintiff argued, for the first time, that the Navy's paralegal, Legalman Kaiser, violated 18 U.S.C. §§ 2703(a) and (b) when he called the toll-free telephone number at America Online ("AOL") to confirm that the member

profile at issue in this case belonged to plaintiff. Am. Compl. ¶¶ 57, 59-60, 62. In granting plaintiff's motion for a preliminary injunction, the Court found plaintiff's argument persuasive. Mem. op. at 8. However, defendants were never given an opportunity to respond in writing to the argument. They therefore take this opportunity to do so, and to demonstrate the inapplicability of §§ 2703(a) and (b) to this case.

Sections 2703(a) and (b) provide that a "governmental entity" may "require" a "provider of electronic communications service" or of "remote computing service" to "disclose the contents" of certain "electronic communication[s]" only by using a warrant or, in certain cases, a subpoena or court order. (Emphasis supplied.) In this case, the Navy did nothing to "require" the disclosure of information by AOL, i.e., to compel production. Instead, it merely made an informal request for production, which AOL was free to turn down. See AR 14.

In addition, the Navy did not seek -- nor was it given -- the "contents" of any "electronic communication." As used in §§ 2703(a) and (b), the term "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). The "contents" of any "electronic communication" "includes any information concerning the substance, purport, or meaning of that communication." Id. § 2510(8).

In this case, the only thing that Legalman Kaiser asked AOL to do was "confirm the profile sheet, who it belonged to." AR 14. The only thing that AOL disclosed was that the profile sheet "came from Hawaii and that it was 'Timothy R. McVeigh' on the billing." Id. No other information was requested from AOL, and none was provided. Id. 14, 16-17. A fortiori, no "contents" of any "electronic communication" were disclosed, and no violation of § 2703(a) or (b) took place. See id.

Nothing contained in 18 U.S.C. § 2703(c) is contrary to the foregoing. See mem. op. dated & filed Jan. 26, 1997, at 8. Section 2703(c)(1)(B) states that a "provider of electronic communication service or remote computing service" may disclose "a record or other information pertaining to a subscriber to or customer of such service" to a "governmental entity" only if the governmental entity obtains a warrant, court order, or the consent of the subscriber or customer.^{4/} However, "the contents of communications covered by [§ 2703](a) or (b)" are expressly excluded from the purview of § 2703(c)(1)(B).

In this case, the information that Legalman Kaiser obtained from AOL -- that the profile sheet "came from Hawaii and that it was 'Timothy R. McVeigh' on the billing" -- was information within the purview of § 2703(c)(1)(B), i.e., "information pertaining to a subscriber to or customer of" AOL. Because

^{4/}In certain cases, customer or subscriber information within the purview of § 2703(c)(1)(B) may also be obtained through use of an administrative or other subpoena. See 18 U.S.C. § 2703(c)(1)(C).

information covered by § 2703(c)(1)(B) is not covered by § 2703(a) or (b), the only subsection of 18 U.S.C. § 2703 that could possibly apply to this lawsuit is § 2703(c). The applicability of § 2703(c) would be limited, however, by the fact that "the language of § 2703(c) does not prohibit any governmental conduct, and thus a governmental entity may not violate that subsection by simply accessing information improperly." Tucker v. Waddell, 83 F.3d 688, 693 (4th Cir. 1996).

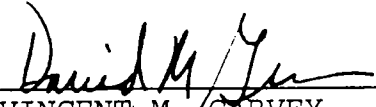
In view of the foregoing, the Court should now make a final determination on the issuance of a permanent injunction. In doing so, the Court should find that no violation of the Electronic Communications Privacy Act -- or of any other provision of law -- has taken place in this case. Plaintiff should therefore be denied a permanent injunction, and the case dismissed.^{2/}

^{2/}Defendants hereby reiterate all arguments made in opposition to plaintiff's motions for a temporary restraining order and preliminary injunction, including the argument that evidence in the record independent of the conversation between Legalman Kaiser and AOL indicated that the e-mail and member profile at issue in this case belonged to plaintiff. Not only did plaintiff admit on the record that the e-mail and member profile were his, see AR 84, 85; but the contents of the e-mail and the context in which it was sent to Ombudsman Hajny indicated the same thing. See id. 12, 65-66, 110. Accordingly, the conversation between Legalman Kaiser and AOL was, at most, harmless error. See Defs.' Opp'n Pl.'s Mots. Temp. Restr'g Order & Prelim. Inj. at 16-17, 22.

Dated: January 26, 1998

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney



VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 1998, a copy of Defendants' Statement re Status Conference was sent by fax and by first-class mail, postage prepaid, to:

Christopher Wolf, Esq.
Proskauer Rose LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, Secretary of
Defense, et al.,

Defendants.

No. 1:98CV00116 (SS)

DEFENDANTS' SECOND
STATEMENT RE STATUS
CONFERENCE

STATEMENT

On February 13, 1998, the Navy made three billets available to plaintiff commensurate with "his qualifications, his career progression, the Order of the District Court, and the needs of the naval service." DeCicco Decl. ex. A at 1. Plaintiff objects to the billets made available to him but, as discussed below, his objections are both nonjusticiable and without merit.

Plaintiff is an Electronics Technician Senior Chief (Submarine Service) ("ETCS(SS)") in the Navy. Administrative Record ("AR") 191. His pay grade is E-8. Id. 81. In April 1997, following service on a nuclear submarine homeported in San Diego, California, plaintiff was assigned to the USS CHICAGO (SSN-721), a nuclear submarine homeported at Pearl Harbor, Hawaii. See id. 238. While assigned to the CHICAGO, plaintiff served as the senior noncommissioned officer, or "Chief of the Boat" ("COB"). Id. 65. During his tenure as COB, plaintiff received a salary increment, known as "sea pay," of \$400 per month. Castell Decl. ¶ 2(D); see Glass Decl. (Mar. 3, 1998) ex. A at 2.

On September 17, 1997, plaintiff was transferred from the CHICAGO and given a temporary shore billet at Pearl Harbor with Submarine Squadron THREE, the submarine squadron to which the CHICAGO is assigned. See AR 81. The transfer of plaintiff took place after an investigation under the military's policy on homosexual conduct, 10 U.S.C. § 654, had been triggered by an e-mail that plaintiff had sent and by the "member profile" associated with the e-mail. See id. 12.

On October 1, 1997, Electronics Technician Master Chief (Submarine Service) ("ETCM(SS)") Philip C. Moore was assigned as COB on the CHICAGO. Castell Decl. ¶ 2(A). The orders given to ETCM(SS) Moore were permanent change of station orders that do not expire until October 2000. Id.

By message dated January 5, 1998, the Navy's Bureau of Personnel ("BUPERS") directed the commander of Submarine Squadron THREE to discharge plaintiff within 10 days. Id. 395. BUPERS issued the directive after an administrative discharge board had found that plaintiff had engaged in homosexual conduct in violation of § 654; as evidenced by his e-mail and member profile. See id. 104.

On January 15, 1998, plaintiff brought suit to enjoin his discharge. Init. Compl. prayer ¶¶ 1, 2. By order dated January 29 and filed January 30, 1998, the Court enjoined the discharge by restraining defendants from

taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiff's Naval Service, on the basis of his alleged sexual orientation so long as

Plaintiff is in compliance with 10 U.S.C. § 654 and relevant regulations as interpreted by this Court in its January 26, 1998 opinion.

By memorandum dated January 30, 1998, the Navy asked plaintiff to "submit an indication of his preferences, commonly called a 'dream sheet,' setting forth the assignments in which he would be interested." Glass Decl. (Mar. 3, 1998) ex. B. By letter dated February 3, 1998, plaintiff responded by advising the Navy that he wished one of the following five billets to be his next assignment, and by stating that he wished to receive sea pay whichever of the billets he received:

- a. Chief of the Boat, U.S.S. Chicago (SSN 721).
- b. Chief of the Boat, any submarine homeported in San Diego, California.
- c. Senior Enlisted Advisor (Command Master Chief for Shore Activity) in Kings Bay, Georgia.
- d. Senior Enlisted Advisor (Command Master Chief for Shore Activity) in San Diego, California.
- e. Any Senior Enlisted Advisor Billet (Shore Activity) as determined by BUPERS to be suitable and available.

Glass Decl. (Mar. 3, 1998) ex. C at 1-2.

By memorandum dated February 13, 1998, the Navy made the following three billets available to plaintiff in lieu of the five that he had requested:

- a. Naval Computer and Telecommunications Area Master Station, Eastern Pacific, Wahiawa, HI. This is an E-8 billet in which ETCS(SS) McVeigh would be the leading CPO [Chief Petty Officer] of a special communications division. This Communications station has six other sites under its direction and is responsible for connectivity of special communications in support of national security. This billet is classified as shore duty.

b. Naval Submarine Training Facility, Pacific, Pearl Harbor, HI. This is a new billet coming on line for an E-8 or E-9 with an instructor background, which ETCS(SS) McVeigh possesses. He would work in the curriculum information standards office and head up the local training authority, and be the Fleet Liaison for non-traditional education for all commands. This billet will require significant interaction with civilian universities to evaluate accreditation of military training and on the job training for college credit. This billet is classified as shore duty.

c. SSEP PAC [Submarine Surveillance Equipment Program Pacific], Pearl Harbor, HI. This is an E-8 billet in which ETCS(SS) McVeigh would be the leading CPO on the ESM [Electronic Support Measures] Groom Team. This position normally requires the incumbent to travel extensively to various locations throughout the world in support of submarine special operations electronics. This billet is classified as sea duty for rotational purposes and the incumbent would receive per diem while in a travel status and would be entitled to sea pay on a day-for-day basis while underway.

DeCicco Decl. ex. A at 1-2.

The Navy advised plaintiff that he would not be entitled to sea pay if he chose either of the first two billets, and that he would be entitled to sea pay "only during certain periods" if he chose the third. DeCicco Decl. ex. A at 2.

By letter dated February 18, 1998, plaintiff rejected the three billets that the Navy had made available to him, and threatened to "raise the issue with the Court" if the Navy did not give him one of the five billets he had requested, together with sea pay. Glass Decl. (Mar. 3, 1998) ex. A at 2.

ARGUMENT

THE NAVY SHOULD NOT BE DIRECTED TO GIVE PLAINTIFF ANY OF THE BILLETS HE HAS REQUESTED.

In Orloff v. Willoughby, 345 U.S. 83 (1953), a soldier who objected to the billet he had been given argued that he was entitled to "habeas corpus to obtain a judicial review of his assignments to duty." 345 U.S. at 92. Rejecting the plaintiff's argument, the Supreme Court said:

[W]e have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

* * * * It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.

345 U.S. at 94-95 (emphasis supplied).

In Wilson v. Walker, 777 F.2d 427 (8th Cir. 1985), the court relied on Orloff in holding nonjusticiable the argument of a military officer that his right to due process had been violated by his reassignment from flying duty to duty as a supply officer. 777 F.2d at 429. The court said:

Traditional notions of judicial restraint and of the separation of powers require this Court to refrain from interfering in matters such as military duty assignments, both because of our lack of expertise in those areas and because responsibility for such matters is explicitly delegated to the other two coordinate branches of our national government.

Id. Accord Schlanger v. United States, 586 F.2d 667, 671, 672 (9th Cir. 1978), cert. denied, 441 U.S. 943 (1979) (holding that "internal military decisions such as duty orders or duty assignments" are not subject to judicial review); Bennett v. Tarquin, 466 F. Supp. 257, 262 (D. Hawaii 1979) (questioning

whether "reinstatement of petitioners to nuclear submarine duty is within the power of the district court to order under any circumstances").

As the foregoing cases make clear, this Court lacks jurisdiction to review the billet choices that the Navy has given plaintiff. Even assuming, arguendo, that the Court possessed such jurisdiction, the billet choices would withstand judicial review.

A. The Navy Acted Properly in Declining to Make a COB Billet on a Submarine Available to Plaintiff. When an individual is found to have been the victim of employment discrimination in violation of Title VII, "a presumption exists in favor of reinstatement as an equitable remedy."⁴ Daniels v. City of Alcoa, 732 F. Supp. 1467, 1478 (E.D. Tenn. 1989). However, reinstatement is inappropriate where "it would result in displacement of an innocent third party." Id.; accord Gallo v. John Powell Chevrolet, 779 F. Supp. 804, 815 (M.D. Pa. 1991).

In this case, assignment of plaintiff to a COB billet would be inappropriate. "All Chief of the Boat billets (Atlantic and Pacific Fleets) have been filled through September 1999," including plaintiff's former billet on the CHICAGO. DeCicco Decl. ex. A at 1; Castell Decl. ¶ 2(A). To make a COB billet available to plaintiff would therefore require the Navy "to

⁴Reference to the law under Title VII is by analogy; Title VII does not apply to uniformed members of the armed forces. E.g., Roper v. Department of the Army, 832 F.2d 247, 248 (2d Cir. 1987).

displace another deserving service member who has already received orders into such a billet." DeCicco Decl. ex. A at 1. Such action could not be justified. Gallo, 779 F. Supp. at 815; Daniels, 732 F. Supp. at 1478.

B. The Navy Acted Properly in Declining to Make Available to Plaintiff the Shore Billets He Had Requested. In addition to asking that he be given a billet as a COB on a submarine, plaintiff has asked that he be given one of several shore billets as a Senior Enlisted Advisor (Command Master Chief for Shore Activity). Glass Decl. (Mar. 3, 1998) ex. C at 1-2. For a series of reasons, however, plaintiff "does not qualify for a position as Command Master Chief Ashore." DeCicco Decl. ex. A at 1. As the Navy has explained: "[Plaintiff] does not have the proper NEC [Navy Enlisted Classification] (9580), he is not an E-9, and he has not been selected by a Navy-wide selection board as a Command Master Chief." Id. Nor can these requirements be waived. DeCicco Decl. ex. B at 2.

No justification exists for plaintiff to be given a promotion to E-9 that he has not yet earned, much less a promotion in contravention of standard Navy procedures that would come at the expense of other eligible individuals. As a result, the Navy has not acted improperly in declining to make available to plaintiff a billet as a command master chief ashore.

C. The Billets That the Navy Has Made Available to Plaintiff Are Not Improper Because They Are Located in Hawaii.

In rejecting the three billets that the Navy has made available, plaintiff has expressed unhappiness that none of the billets is located outside Hawaii. Glass Decl. (Mar. 3, 1998) ex. A at 3. However, plaintiff has not served in Hawaii long enough to be entitled to a billet elsewhere. As the Navy has explained:

Since ETCS(SS) McVeigh just executed a change of homework from San Diego to Pearl Harbor in 1997, he has not fulfilled his required tour length in Pearl Harbor of 36 months under the Department of Defense's Area Tour requirements for Hawaii (Department of Defense Directive 1317.5). While waivers to the area tour requirement are considered, the reasons are limited to humanitarian, medical or Navy readiness issues.

DeCicco Decl. ex. B at 2.

Even assuming, arguendo, that plaintiff had served in Hawaii long enough to be entitled to a billet in another locale, the expense of transferring him to such a billet could hardly be justified where, as here, "there are billets of a sufficient level for him in Hawaii." DeCicco Decl. ex. B at 2. The billet choices that the Navy has made available to plaintiff are not, therefore, improper.

D. The Billets That the Navy Has Made Available to Plaintiff Are Not Improper Because They Involve Work for Which He Is Overqualified. Plaintiff has also objected to the billets that the Navy has made available on the ground that all of them involve "Division Leading Chief Petty Officer Positions (CPO) billets with limited or no personnel management and supervisory responsibilities." Glass Decl. (Mar. 3, 1998) ex. A at 2.

According to plaintiff, the billets are unsuitable because he allegedly "supervise] the actions of 134 men" when he was COB of the CHICAGO, and because he served in division CPO billets earlier in his career. Id.

For two reasons, plaintiff's arguments are without merit. First, plaintiff was not the supervisor of 134 men when he was the COB of the CHICAGO. DeCicco Decl. ex. B at 1. Indeed, he was neither the supervisor -- nor the commander -- of anyone. Id. Instead, "he was principal enlisted advisor to the Commanding Officer on matters concerning the crew's morale, welfare, training, job satisfaction and utilization." Id.

Nor would the billets be inappropriate for plaintiff even if his role as COB had been supervisory. As the Navy has explained:

[The measure of an assignment should not be judged exclusively by the number of personnel supervised, even if there has been a supervisory relationship in a prior assignment. Many highly sought-after positions do not involve the supervision of large numbers of personnel. In addition, to be competitive for promotion, a service member must display sustained superior performance in a variety of assignments.

DeCicco Decl. ex. B at 1-2.

Second, the billets made available to plaintiff do not represent a step back in terms of his career progression. "Post-COB assignments" for naval personnel typically include "department CPO positions and shore duty." DeCicco Decl. ex. B at 2 & att. In this case, the billets that the Navy has made available to plaintiff are completely appropriate for someone in plaintiff's position. As the Navy has explained:

The three billets * * * are specialty positions, wholly appropriate for a post-COB tour, which are not easily categorized into a description such as a "departmental CPO." The proper performance of any of these assignments will have far-reaching effects throughout the Navy, not merely at the local command level. As such, promotion boards have historically given these positions the same or higher status than a departmental CPO tour. Characterization of these positions as not commensurate with or better than a departmental CPO tour is simply wrong.

Castell Decl. ¶ 2(B).

The billets that the Navy has made available to plaintiff are not demeaning or undesirable. Indeed, "a number of ETCS(SS) McVeigh's peers have contacted [BUPERS] seeking assignment to these billets." DeCicco Decl. ex. B at 1. Plaintiff's objections to the billets are therefore unjustified.

E. The Billets That the Navy Has Made Available to Plaintiff Are Not Improper Because of the Unavailability of Sea Pay. A final objection that plaintiff has made to the billets that the Navy has made available is that acceptance of the billets would result in his loss of the sea pay to which he was entitled while assigned to the CHICAGO. See Glass Decl. (Mar. 3, 1998) ex. A at 2-3. According to plaintiff, the Navy should make sea pay available to him -- "or its equivalent in a monetary settlement between the parties" -- regardless of the billet he is given. Id. at 3.

Plaintiff's argument is without merit. Sea pay is a statutory pay increment to which "a member of a uniformed

service" is entitled "while on sea duty."^{2/} 37 U.S.C. § 305a(a). For purposes of sea pay, "sea duty" consists -- with certain exceptions -- of duty performed by a service member while assigned to a ship, "the primary mission of which is accomplished while under way." Id. § 305a(d)(i).

Two of the three billets that the Navy has made available to plaintiff are shore billets, not sea billets. DeCicco Decl. ex. A at 2. For those billets, sea pay is unavailable. Id. In the same way, sea pay is unavailable for the shore billets that plaintiff has proposed for himself.

The third billet that the Navy has made available to plaintiff -- the SSEP PAC billet -- would make sea pay available to plaintiff whenever he was at sea. DeCicco Decl. ex. A at 2. As the Navy has explained: "This billet is classified as sea duty for rotational purposes and the incumbent * * * would be entitled to sea pay on a day-for-day basis while underway." Id.

The purpose of sea pay is to "recogniz[e] and compensat[e] those who [are] willing to serve under the unique conditions associated with duty at sea." S. Rep. No. 95-826, at 124 (1978). The conditions of sea duty that make sea pay appropriate are the following:

- (1) cramped living and working conditions aboard ships;
- (2) unpredictability of ship operating schedules; (3) limited recreational facilities at sea; (4) inport duties to maintain readiness; (5) exceptionally long

^{2/}Sea pay is not available to personnel below pay grade E-4. 37 U.S.C. § 305a(b).

working hours at sea; (6) long and repetitive deployments; and (7) family separations.

Id.

If plaintiff were to be assigned to any of the shore billets that the Navy has made available, he would not experience the "unique conditions associated with duty at sea" that make sea pay appropriate. As a result, he would not be "losing" any sea pay to which he would be entitled because he would not be experiencing the conditions that Congress intended to compensate.

In addition, any loss of sea pay would be offset by two types of payments. First, plaintiff would be entitled to "commuted rations" of \$208 per month during the time that he was assigned to a shore billet. Castell Decl. ¶ 2(C). Commuted rations are payments made to naval personnel to help them buy meals ashore. See Bennett, 466 F. Supp. at 260.

Second, one of the billets made available to plaintiff -- the SSEP PAC billet -- would require a considerable amount of travel: an "estimated 155 days per year away from homeport." DeCicco Decl. ex. B at 2. While on travel, plaintiff would be entitled to payment at a prescribed rate for meals and incidental expenses, "without itemization of expenses and without receipts." Joint Fed. Travel Regs., vol. 1, ch. 4, ¶ U4125(A)(3).

Because entitlement to sea pay is governed by statute, no source of funds exists upon which "a monetary settlement between the parties" could be based. As a result, no such settlement is possible.

CONCLUSION

For the foregoing reasons, plaintiff should be directed to advise the Navy promptly of his choice among the three billets made available to him, so that appropriate orders may issue.

Dated: March 4, 1998

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney

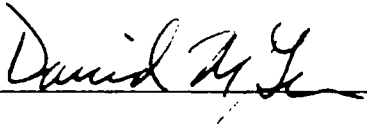


VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 1998, a copy of Defendants' Second Statement re Status Conference and the Declarations of Lieutenant Commander Joseph C. Castell, Captain W.A. DeCicco and David M. Glass was sent by fax and by first-class mail, postage prepaid, to:

Christopher Wolf, Esq.
Proskauer Rose LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TIMOTHY R. McVEIGH,

Plaintiff,

v.

THE HONORABLE WILLIAM S. COHEN,
et al.,

Defendants.

CASE NO. 1:98CV00116 (ss)

PLAINTIFF'S STATUS REPORT

In preparation for the status conference in this matter currently scheduled for March 5, 1998, Plaintiff reports as follows:

I. The Navy Has Failed To Comply With The Court's Order And Has Not Agreed To A Suitable Posting For Senior Chief McVeigh

Senior Chief McVeigh was deprived of his post as Chief of the Boat ("COB") of the nuclear submarine U.S.S. Chicago as a result of the Navy's improper investigation into his alleged homosexuality. At our last status conference, we indicated to the Court that the Navy had not, and evidently would not return Senior Chief McVeigh to his post as COB of the Chicago and had assigned him to duty which was in no way commensurate with his rank, experience, training, prior postings and stellar performance evaluations. The Court agreed that its Order required the Navy to place Mr. McVeigh in a position that was equivalent to the post he held before the Navy's illegal actions and that failure to do so could constitute contempt. Prior

to Mr. McVeigh seeking a contempt order, however, the Court encouraged the parties to work together to arrive at a suitable billet.

Unfortunately, despite efforts to agree on a posting that would make Mr. McVeigh whole, we are at loggerheads with the Navy and have no choice but to seek the Court's intervention. Senior Chief McVeigh's position as COB, which he would have held until May 2000 but for the Navy's actions, made him the senior enlisted man aboard a nuclear submarine — an elite position within the naval service in which he supervised over 134 men and reported directly to the Captain — and entitled him to over \$415 per month in sea pay. Following the Court's order, Mr. McVeigh provided the Navy with his assignment preferences, which were (1) to be returned to his post as COB of the Chicago; (2) to be made COB of any other nuclear submarine; (3) to be given shore duty at the level equivalent to Mr. McVeigh's prior position at sea or at the level he would have been at if allowed to complete his tour as COB, with his lost sea pay until May 2000 made up in a settlement between the parties. See February 3, 1998 Letter from Alec Farr to David Glass, attached as Exh. A.

Although anything but a COB assignment would not truly make Mr. McVeigh whole in terms of prestige and opportunity for advancement, he was and is willing to accept an equivalent shore position if he receives his lost sea pay. Following our February 3, 1998 status conference, the Navy indicated it would limit its search to positions "that would be regarded in the submarine community as career enhancing follow-on tours for one who has already completed a tour as Chief of the Boat (COB)." See February 2, 1998 Letter from David Glass to Christopher Wolf enclosing Memorandum dated January 30, 1998, attached as Exh. B.

Notwithstanding this assurance, the Navy has refused to consider giving Mr. McVeigh a COB billet and has proposed shore billets which are not equivalent to the COB billet Mr. McVeigh held before the Navy's unlawful investigation, let alone a "career enhancing, follow-on tour for one who as already completed" a COB tour. See February 18, 1998 Letter from Alec Farr to David Glass, attached as Exh. C. and February 13, 1998 Letter from David Glass to Alec Farr enclosing Letter and Memorandum of same date, attached as Exh. D. The assignments proposed by the Navy are Division Leading Chief Petty Officer (LCPO) billets that do not involve any significant personnel supervision. Mr. McVeigh was filling LCPO billets approximately eight years ago and has since progressed through Department Leading Chief Petty Officer billets and Command billets, such as being COB of the Chicago.

In addition, the Navy will not agree to give Mr. McVeigh the sea pay he would have earned until May 2000 but for the Navy's investigation if he accepts one of the proposed shore billets. The loss of pay alone if Plaintiff were to accept this arrangement would be \$13,695.00, a sizable sum for anyone and an enormous one for an enlisted serviceman.

It appears that the Navy is unwilling or unable to make Mr. McVeigh whole and return him as nearly as possible to the indisputably stellar career path he had established for himself in the Navy. As we indicated at the last conference, as an alternative Mr. McVeigh would be willing to accept early retirement (Mr. McVeigh has served 17 years) so long as the Navy agrees, or the Court orders the Navy to provide him with pension benefits equivalent to the 24-year term he had planned to serve before the Navy's unlawful actions in this case. While Mr. McVeigh would prefer to continue serving his country, it appears from the Navy's unwillingness or

inability to give him an appropriate posting that early retirement is the best alternative for both parties.

II. Plaintiff's Request for Attorneys' Fees and Costs Should Be Ruled Upon At The Upcoming Status Conference, As Provided in the Court's Order of January 30, 1998

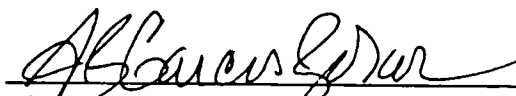
In the Court's Order of January 30, 1998, it indicated that at the upcoming status conference, it would "rule on Plaintiff's request for attorneys' fees and costs, with the parties' submissions on these matters being filed before that date". The Order made no provision for discovery on the fees and costs issue — which would have been necessary if discovery were to be completed in time for the Court's consideration of the fees and costs issue. The Court's Order followed the parties' concurrence that this procedure for resolving the issue was acceptable. Accordingly, Plaintiff filed its straightforward and fully-supported request for fees and costs on February 13, 1998.

Rather than file a responsive memorandum, defendants first served grossly overbroad discovery requests, which on their face were intrusive of the attorney-client privilege in *other* cases, and they now seek an extension of time in order to pursue the issue of counsel's "true" billing and disbursement rates. The time for plaintiff's response to the discovery or the motion has not arisen.

Plaintiff respectfully submits that the Court should proceed to rule on the attorneys' fees and costs issue at the upcoming status conference, as provided in its Order and as agreed to by the parties. There is more than adequate information before the Court for it to base a ruling on what fees and costs are reasonable and appropriate in the circumstances. Defendants' suggestion that discovery is necessary to determine whether the requested fees and costs were "true" is

offensive and uncalled for. The requested hourly rates are the ordinary rates charged by counsel for plaintiff. Wolf Decl. ¶ 6. The Court will recognize that the requested fees and costs are entirely consistent with fees charged by similarly qualified firms, and that the hours expended were completely justified given the emergency nature of the litigation and the novelty of the issues raised by the Navy's "search and destroy" mission, which ran afoul both of the Don't Ask, Don't Tell, Don't Pursue policy and the Electronic Communications Privacy Act. It ill-behooves defendants to suggest that plaintiff's counsel expended too much time on this matter, given the vehemence of their unfounded defense and the multiplicity of lawyers and officers involved (and present at prior hearings in this matter).

Respectfully Submitted,



Christopher Wolf (D.C. Bar No. 335885)

Alec W. Farr (D.C. Bar No. 440046)

Amybeth García-Bokor (D.C. Bar No. 453279)

PROSKAUER ROSE, LLP

1233 Twentieth Street, N.W.

Suite 800

Washington, D.C. 20036

(202) 416-6800

Dated: March 4, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via hand delivery this 4th day of March, 1998 to:

David Glass
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004

Counsel for Defendants

and by pre-paid first class mail to:

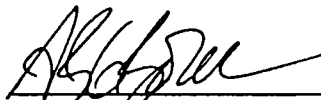
The Honorable John H. Dalton
Secretary of the Navy
Department of the Navy
1000 Navy Pentagon, Room 4E686
Arlington, VA

The Honorable William S. Cohen
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon, Room 3E880
Arlington, VA

Acting U.S. Attorney Wilma Lewis
United States Attorney Office
555 4th Street, N.W.
5th Floor, Room 5806A
Washington, D.C. 20001

and by certified mail to:

Attorney General Janet Reno
Department of Justice
10th & Constitution Avenue, N.W., Room 5111
Washington, D.C. 20530


Amybeth Garcia-Bokor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al

Defendants.

CIV. ACTION NO. 1:98CV00116 (ss)

**PLAINTIFF'S MEMORANDUM OF LAW ON THE JUSTICIABILITY
OF DEFENDANTS' COMPLIANCE WITH THE PERMANENT INJUNCTION**

INTRODUCTION

This Memorandum of Law addresses the Court's power and authority to review and address the Defendants' compliance with its Orders, and is submitted in light of the Defendants' assertion that their actions pursuant to those Orders are unreviewable.

On January 30, 1998, the Court entered a permanent injunction forbidding the Defendants from "taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiff's Naval Service, on the basis of his alleged sexual orientation so long as Plaintiff is in compliance with 10 U.S.C. § 654 and relevant regulations as interpreted by this Court in its January 26, 1998 opinion." To date, more than a month after the Court's Order, the Defendants have failed to comply with the Order, and have placed Plaintiff in temporary non-career advancing and inappropriate clerical jobs. Moreover, the Defendants are proposing to place Plaintiff in one of three specified positions, not one of which is commensurate

with the rank, years of service and skills which Plaintiff possesses. In short, these are jobs which plainly "hinder [Plaintiff's] Naval Service" and thus violate the Court's January 30, 1998 Order. Defendants take the position that this Court is powerless to review their compliance with the injunctive relief which has been ordered. Defendants rest their argument on Orloff v. Willoughby, 345 U.S. 83 (1953), a case having nothing do with compliance with a Court Order following a finding of illegal government conduct, and which therefore is not at all relevant to the current situation, as we explain in more detail herein.

In short, the government's brazen suggestion at the hearing held on March 5, 1998 that it could make Mr. McVeigh a janitor if it wanted to, and the Court could do nothing about it, ignores the authority (and responsibility) this Court has to ensure compliance with its Orders. It also is a stark admission that still, today, the Navy refuses to accept responsibility for its illegal conduct directed at Plaintiff.

**THE NAVY'S FAILURE TO COMPLY WITH THE
PERMANENT INJUNCTION IS A JUSTICIABLE MATTER**

It is beyond cavil that a federal district court retains authority to enforce its orders. Defendants' claim, however, that because the military is involved in this case, the Court loses that authority. That argument is baseless.

Judicial enforcement of the permanent injunction in this case is essential for the Court's rulings to have any meaning. The Navy claims that it cannot comply with the injunction directly, by reinstating Plaintiff as Chief of the Boat ("COB") on the USS Chicago or by placing him in a COB position on *any other* submarine; and it has not offered him alternative jobs commensurate with his position and rank or jobs that he would have been entitled to hold upon completion of his tour of duty aboard the USS *Chicago* had that tour not been interrupted by the Navy's illegal

conduct. As Plaintiff will show in the scheduled trial, the positions the Navy has offered are distinctly not career-advancing, and will serve to hinder Plaintiff's Naval Service. Compounding the Defendants' refusal to comply with the injunction is their assertion that their compliance (or not) with the current injunction is non-justiciable.

As an initial matter, Defendants' blanket position that the Court may not review internal military affairs, such as billeting orders, has been routinely rejected. *See, e.g., Jorden v. Nar'l Guard Bureau*, 799 F.2d 99, 109 (3d Cir. 1986) ("the [Supreme] Court has not established a per se rule that military matters are not subject to judicial review") (citing cases); *Shaw v. Gwatney*, 795 F.2d 1351, 1357-58 (8th Cir. 1986) (reinstating Army officer and rejecting argument that Court should defer to military determinations of internal affairs); *Wallace v. Chappell*, 661 F.2d 729, 730 (9th Cir. 1983) ("there is no per se rule precluding review of duty assignments"), *rev'd on other grounds*, 462 U.S. 296 (1983); *Dillard v. Brown*, 652 F.2d 316, 324 (3rd Cir. 1981) (finding claim of discrimination and violation of constitutional privacy right justiciable).

In support of the position that review of their compliance with this Court's order is not justiciable, Defendants rely upon cases that are plainly distinguishable. *See* Defs. Second Statement Re Status Conf. at 5-7. For example, Defendants base their position that Plaintiff's objection to their proffered remedy cannot be heard on the Supreme Court's decision in *Orloff v. Willoughby*, 345 U.S. 83 (1953), in which the Court declined to grant *habeas corpus* review to an Army doctor's objection to a duty assignment following the doctor's failure to sign a loyalty statement. Defs. Second Statement Re Status Conf. at 5. But the holding in *Orloff*, as in the other cases cited by Defendants, is much narrower. As one court has noted, "*Orloff* teaches no more than that the exercise of military discretion involving duty assignments will not be reviewed by a court if there has been no statutory or constitutional violation." *Dillard*, 652 F.2d at 322

(emphasis added). Similarly, in adopting a balancing test to determine the reviewability of internal military decisions, the Ninth Circuit, mindful of *Orloff*, held that "there is no per se rule precluding review of duty assignments." *Wallace*, 661 F.2d 729, 732-33.^{1/}

The case at bar is clearly justiciable; until now, there has been no contention otherwise. The Court has found that the Defendants violated Plaintiff's statutory rights and, accordingly, ordered a remedy. The remedy ordered by this Court flowed from the legal harm the Defendants inflicted upon Plaintiff. The Navy's interposition of the justiciability issue now, to support its recalcitrance at the remedial stage of these proceedings, is insupportable. The Defendants simply cannot divorce the remedy they must now provide from their underlying violation of Plaintiff's rights. Moreover, Defendants' suggestion that enforcing the Order enjoining the Navy from derailing Plaintiff's career requires the Court to "run the Navy" is misplaced. The Order does not demand more than that Defendants themselves identify positions in which Plaintiff could serve in the manner he otherwise would have served if not for the Defendants' illegal conduct. The Navy's unwillingness to do so, which has engendered this dispute, can hardly be the basis for Defendants' claim that its refusal is entitled to deference.

In addition, none of the cases Defendants cite to support their argument involve underlying misconduct by the military that the Service had been ordered to remediate. Rather, in each case Defendants cite, a court declined review of a servicemember's objection to a duty assignment made in the normal course of duty. See *Orloff*, 345 U.S. at 83, 95 (refusing to grant *habeas corpus* review to Army physician's duty assignment following his refusal to execute

^{1/} In *Wallace*, the court adopted the balancing test articulated in *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971). See also *Knehans v. Callaway*, 403 F. Supp. 290, 293 (D.D.C. 1975) (finding that "[c]ourts will not hesitate to review military action allegedly contrary to statute or regulation" and citing *Mindes, supra*), *aff'd* 566 F.2d 312 (D.D.C. 1975).

loyalty certificate); *Wilson v. Walker*, 777 F.2d 427, 428 (8th Cir. 1985) (refusing to review disciplinary reassignment of duties); *Schlanger v. United States*, 586 F.2d 667, 672 (9th Cir. 1978) (refusing to review disciplinary decision to reassign Plaintiff from educational program to a post), *cert denied*, 441 U.S. 943 (1979); *Bennett v. Tarquin*, 466 F. Supp. 257 (D. Hawaii 1979) (refusing to review disciplinary measures taken against servicemembers for drug possession). In stark contrast to those cases, Plaintiff here is guilty of no underlying disobedience and is not attempting to evade an assignment given in the normal course of duty. Rather, the Navy, after violating its own regulations and disrupting Plaintiff's career, now refuses to place him in a position *that he would have held but for the Navy's underlying misconduct*. The Navy's attempt to shield itself from taking remedial measures under the cloak of discretion in the normal course is utterly misplaced.^{2/}

Plaintiff has identified, as requested by the Defendants, positions commensurate with his rank, training, and experience: Chief of the Boat, USS *Chicago*; Chief of the Boat for any submarine; Senior Enlisted Advisor (Command Master Chief) in two locations; or any Senior Enlisted Advisor Billet as determined to be suitable and available in accordance with normal detailing practices. See Letter from Alec Farr to David Glass attached as Exh. A. to Plaintiff's Status Report.^{2/} The Navy nonetheless asserts that such positions are not available; it has failed

^{2/} Moreover, the Defendants have already recognized their obligation to place Plaintiff in a position commensurate with his training and experience that would be "viewed by the submarine community as career-enhancing, follow-on tours *for one who has already completed a tour as Chief of the Boat (COB)*." See Memorandum dated 30 January 1998 from Capt. Horgan to David Glass attached as Exh. B to Plaintiff's Status Report.

^{3/} In addition, Plaintiff has proposed a settlement that would recognize the service he would have completed (24 years) had the Navy not derailed his career illegally. Defendants also have rejected this offer.

to search for alternative positions; it has restricted the universe of possible positions to Hawaii (claiming undue expense to transfer Plaintiff) and it has offered Plaintiff positions that are not commensurate with Plaintiff's rank, training, and experience, much less positions that would make him whole, or nearly whole for the Navy's violations of his rights. The Navy's clear attempt to punish Plaintiff now, by demotion, for that which this Court has held is not punishable simply should not be condoned.

Accordingly, the trial currently scheduled for March 26, 1998 should proceed, at which time Plaintiff will present evidence showing how Defendants have failed to comply with the injunction now in effect.

CONCLUSION

For the foregoing reasons, the Court should reject the Defendants' arguments that its compliance with the permanent injunction is nonjusticiable.

Respectfully Submitted,



Christopher Wolf (D.C. Bar No. 335885)

Alec W. Farr (D.C. Bar No. 440046)

Amybeth Garcia-Bokor (D.C. Bar No. 453279)

PROSKAUER ROSE, LLP

1233 Twentieth Street, N.W.

Suite 800

Washington, D.C. 20036

(202) 416-6800

Dated: March 6, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via facsimile this 6th day of March, 1998 to:

David Glass
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004
Counsel for Defendants

and by pre-paid first class mail to:

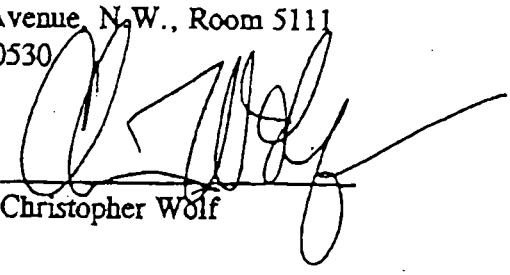
The Honorable John H. Dalton
Secretary of the Navy
Department of the Navy
Washington, DC 20350-1000

The Honorable William S. Cohen
Secretary of Defense
U.S. Department of Defense
Washington, DC 20301-1000

Acting U.S. Attorney Wilma Lewis
United States Attorney Office
555 4th Street, N.W.
5th Floor, Room 5806A
Washington, D.C. 20001

and by certified mail to:

Attorney General Janet Reno
Department of Justice
10th & Constitution Avenue, N.W., Room 5111
Washington, D.C. 20530


Christopher Wolf

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.

Defendants.

**CIV. ACTION NO. 1:98CV00116
Judge Stanley Sporkin**

**PLAINTIFF'S UNOPPOSED MOTION
AND MEMORANDUM TO POSTPONE TRIAL**

Plaintiff Timothy R. McVeigh hereby moves to postpone the trial currently scheduled for March 26, 1998 because the necessity of a trial may be eliminated if Plaintiff receives a promotion for which he is eligible and shortly will be considered. Defendants have advised Plaintiff that they do not object to this postponement. The specific grounds for this motion are as follows:

(1) At the status hearing on this matter held March 5, 1998, the parties informed the Court of a dispute concerning the Government's compliance (or lack thereof) with the Court's January 30, 1998 Order.

(2) Specifically, Plaintiff claimed (and continues to claim) that Defendants have failed to reinstate him in a position commensurate to that which he held prior to his unlawful discharge and thus have hindered his naval service in violation of the Court's Order. Defendants claimed (and continue to claim) that they have fully complied with the Order by proposing three

shore billets which the Navy believes to be appropriate for a Senior Chief Petty Officer (grade E-8) like Mr. McVeigh. Plaintiff contends the three shore billets are not commensurate with his rank, years of service and skills.

(3) On March 5, 1998 the Court ordered a trial on the issue of whether the Navy had complied with the Court's Order. Final determination of Plaintiff's Motion for Attorney's Fees and Costs was also to be determined on that date.

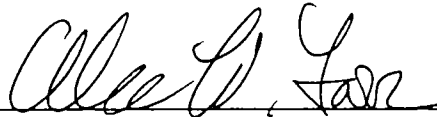
(4) It recently came to the parties' attention that the Navy Master Chief Selection Board is set to convene April 13, 1998 and that Senior Chief McVeigh is eligible for promotion to Master Chief Petty Officer (grade E-9). Plaintiff believes that if and when Mr. McVeigh is promoted, the issue of whether the three billets proposed are suitable for an E-8 in his position will be mooted and Mr. McVeigh will be eligible for E-9 billets that could be satisfactory to both parties. The possibility thus exists that the present dispute can be resolved without the need for a trial.

(5) Consequently, Plaintiff moves to postpone trial until the results of the Master Chief selection board are known. The board is scheduled to adjourn on May 22, 1998. To permit time for discovery and consider their positions following the results of the selection process, the parties respectfully request that trial be postponed until June 22, 1998 or as soon thereafter as the matter may be heard. In the interests of judicial economy, Plaintiff also requests that final determination of Plaintiff's Motion for Attorney's Fees and Costs be postponed until that date as well. Defendants' counsel has advised Plaintiff that Defendants do not object to such a postponement.

(6) In the interim, the parties have agreed that Mr. McVeigh will remain assigned to Submarine Squadron Three in Hawaii pending either (a) the results of the Master Chief Selection Board, or (b) the outcome of the postponed trial, but that he will be given a Temporary Additional Duty assignment ("TAD") to one of the three billets proposed by the Navy. The parties further have agreed that this arrangement does not constitute a waiver of either (a) Plaintiff's argument that these billets are not appropriate positions adequate to make him whole following the Navy's misconduct, or (b) Defendants' argument that permanent assignment to one of the three billets is entirely in compliance with the Court's Order.

Respectfully Submitted,

By:



Christopher Wolf (D.C. Bar No. 335885)
Alec W. Farr (D.C. Bar No. 440046)
PROSKAUER ROSE LLP
1233 Twentieth Street, N.W., Suite 800
Washington, D.C. 20036
(202) 416-6800

Dated: March 24, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via hand delivery this 24th day of March, 1998 to:

David Glass
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004
Counsel for Defendants

and by pre-paid first class mail to:

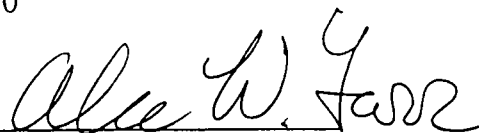
The Honorable John H. Dalton
Secretary of the Navy
Department of the Navy
Washington, D.C. 20350-1000

The Honorable William S. Cohen
Secretary of Defense
U.S. Department of Defense
Washington, D.C. 20301-1000

Acting U.S. Attorney Wilma Lewis
United States Attorney Office
555 4th Street, N.W.
5th Floor, Room 5806A
Washington, D.C. 20001

and by certified mail to:

Attorney General Janet Reno
Department of Justice
10th & Constitution Avenue, N.W., Room 5111
Washington, D.C. 20530


Alec W. Farr

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.

Defendants.

CIV. ACTION NO. 1:98CV00116
Judge Stanley Sporkin

The Court, having read the Plaintiff's Unopposed Motion and Memorandum to Postpone Trial hereby **ORDERS** that, for the reasons stated in Plaintiff's Motion, the trial currently set for March 26, 1998 is hereby postponed until _____, 1998.

IT IS SO ORDERED.

The Hon. Stanley Sporkin
United States District Judge

Dated: _____, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,	)	No. 1:98CV00116 (SS)
	)	
Plaintiff,	)	DEFENDANTS' RESPONSE TO
	)	PLAINTIFF'S UNOPPOSED
v.	)	MOTION AND MEMORANDUM TO
	)	POSTPONE TRIAL
WILLIAM S. COHEN, Secretary of	)	
Defense, <u>et al.</u> ,	)	
	)	
Defendants.	)	

Defendants do not oppose plaintiff's motion to postpone the trial that has been scheduled for March 26, 1998. Defendants agree that, in the event that plaintiff is selected for promotion to Master Chief Petty Officer and is therefore eligible for new positions commensurate with that rank, the current dispute concerning the suitability of other Navy positions that have recently been made available to plaintiff could be moot.

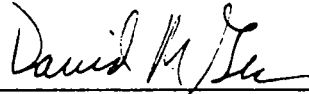
Defendants wish to inform the Court that the Navy has assigned plaintiff temporarily to one of the three positions previously made available to him pending the results of the promotion board. In the event that plaintiff is not selected for promotion, defendants will be prepared to address the suitability of that position -- or any other position available to plaintiff at that time -- should the Court deem it necessary. In the meantime, the Navy plans to fill the other two positions that it has previously made available to plaintiff, based on the Navy's operational needs. Defendants also note that a service member who was serving as Chief of Boat on one of the Navy's submarines has been determined to have a medical condition requiring his

reassignment, and that the service member has been replaced on an interim basis. The Navy has selected an individual to fill this position effective next month.

Dated: March 25, 1998

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney

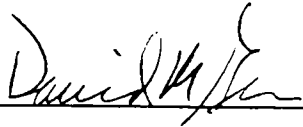


VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 1998, a copy of
Defendants' Response to Plaintiff's Unopposed Motion and
Memorandum to Postpone Trial was sent by fax to:

Christopher Wolf, Esq.
Proskauer Rose LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396



10 USCS @ 1552 (1998) printed in FULL format.

UNITED STATES CODE SERVICE
Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 79. CORRECTION OF MILITARY RECORDS

10 USCS @ 1552 (1998)

@ 1552. Correction of military records: Claims incident thereto

(a) (1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid--

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title [10 USCS @@ 801 et seq.] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to--

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title [10 USCS @@ 801 et seq.] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

HISTORY: (Aug. 10, 1956, ch 1041, @ 1, 70A Stat. 116; June 29, 1960, P.L. 86-533, @ 1(4), 74 Stat. 246; Dec. 12, 1980, P.L. 96-513, Title V, Part B, @ 511(60), 94 Stat. 2925; Dec. 6, 1983, P.L. 98-209, @ 11(a), 97 Stat. 1407.)

(As amended Sept. 29, 1988, P.L. 100-456, Div A, Title XII, Part D, @ 1233(a), 102 Stat. 2057; Nov. 29, 1989, P.L. 101-189, Div A, Title V, Part B, @ 514, Title XVI, Part C, @ 1621(a)(2), 103 Stat. 1441, 1603; Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle F, @ 1052(19), 106 Stat. 2500.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1552(a)	5:191a(a) (less 2d and last provisos). 5:275(a) (less 2d and last provisos).	Aug. 2, 1946, ch. 753, Sec. 207; restated Oct. 25, 1951, ch. 588, 65 Stat. 655.
1552(b)	5:191a(a) (2d and last provisos). 5:275(a) (2d and last provisos).	
1552(c)	5:191a(b), (c). 5:275(b), (c).	

1552(d) 5:191a(d).
 5:275(d).
 1552(e) 5:191a(f).
 5:275(f)
 1552(f) 5:191a(e).
 5:275(e).

In subsection (a), the words "and approved by the Secretary of Defense" are substituted for 5:191a(a) (1st proviso). The words "when he considers it" are substituted for the words "where in their judgment such action is", in 5:191a and 275. The words "officers or employees" and "means of", in 5:191a and 275, are omitted as surplusage. The word "naval", in 5:191a and 275, is omitted as covered by the word "military".

In subsection (b), the words "before October 26, 1961" are substituted for the words "or within ten years after the date of enactment of this section", in 5:191a and 275. The last sentence of the revised subsection is substituted for 5:191a(a) (last proviso) and 275(a) (last proviso).

In subsection (c), the words "if, as a result of correcting a record under this section . . . the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be" are substituted for the words "which are found to be due on account of military or naval service as a result of the action . . . hereafter taken pursuant to subsection (a) of this section", in 5:191a and 275. The words "heretofore taken pursuant to this section", in 5:191a and 275, are omitted as executed. The words "of any persons, their heirs at law or legal representative as hereinafter provided", "(including retired or retirement pay)", "as the case may be", "duly appointed", "otherwise due hereunder", "decendent's", "precedence or succession", and "of precedence", in 5:191a and 275, are omitted as surplusage. The last sentence is substituted for 5:191a(c) and 275(c).

In subsection (b), the word "but" is substituted for the words "That, continuing payments are authorized to be made to such personnel", in 5:191a and 275. The words "if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate" are substituted for the words "without the necessity for reenlistment, appointment, or reappointment to the grade, rank, or office to which such pay (including retired or retirement pay), allowances, compensation, emoluments, and other monetary benefits are attached", in 5:191a and 275. The words "or one year following the date of enactment of this section", in 5:191a and 275, are omitted as executed. The words "for payment of such sums as may be due for", in 5:191a and 275, are omitted as surplusage. The words "(including retired or retirement pay)", in 5:191a and 275, are omitted as covered by the definition of "pay" in section 101(27) of this title.

In subsection (e), the words "No payment may be made under this section" are substituted for the words "Nothing in this section shall be construed to authorize the payment of any amount as compensation", in 5:191a and 275.

References in text:

"The Uniform Code of Military Justice (Public Law 506 of the 81st Congress)", referred to in this section is Act May 5, 1950, ch 169, 64 Stat. 108, which formerly appeared generally as 50 USCS @@ 551 et seq. and was repealed by Act Aug. 10, 1956, ch 1041, @ 53, 70A Stat. 641, 680; similar provisions are now contained in 10 USCS @@ 801 et seq.

Amendments:

1960. Act June 29, 1960 repealed subsec. (f), which read: "The Secretary of

Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid."

1980. Act Dec. 12, 1980 (effective upon enactment on 12/12/80, as provided by @ 701(b)(3) of such Act, which appears as 10 USCS @ 101 note), in subsec. (a), substituted "Transportation" for "the Treasury".

1983. Act Dec. 6, 1983 (effective upon enactment on 12/6/83, as provided by @ 12(a)(1) in part of such Act, which appears as 10 USCS @ 801 note) added subsec. (f).

1988. Act Sept. 29, 1988, in subsec. (b), substituted "for the correction within three years after he discovers the error or injustice" for "therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later"; and, in subsec. (c), in the introductory matter, substituted "The Secretary concerned" for "The department concerned".

1989. Act Nov. 29, 1989 substituted subsec. (a) for one which read:

"The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."; in subsec. (b), substituted "subsection (a)(1)" for "subsection (a)" wherever appearing; and, in subsec. (e), substituted "Secretary of Veterans Affairs" for "Administrator of Veterans' Affairs".

1992. Act Oct. 23, 1992, in subsec. (a)(2), substituted "announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade" for "announcing a decision not to promote an enlisted member to a higher grade".

Other provisions:

Board for the Correction of Military Records. Act Dec. 12, 1989, P.L. 101-225, Title II, @ 212, 103 Stat. 1914, provides:

"Not later than 6 months after the date of the enactment of this Act, the Secretary of Transportation shall--

"(1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the board established by the Secretary under section 1552 of title 10, United States Code, to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

"(2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the board, which are adequate to ensure compliance with paragraph (1) of this subsection."

NOTES:

CODE OF FEDERAL REGULATIONS

Department of Army personnel review boards, 32 CFR Part 581.

Procedures for correction of Navy and Marine Corp records by the Secretary of Navy acting through the Board for Correction of Naval Records, 32 CFR Part 723.

Department of Air Force personnel review boards, 32 CFR Part 865.

Board for Correction of Military Records of the Coast Guard, 33 CFR Part

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 26 1998

Clerk, U.S. District Court
District of Columbia

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

Civil Action No. 98-116
Judge Stanley Sporkin

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff's Motion for a Preliminary Injunction. Plaintiff Timothy R. McVeigh, who bears no relation to the Oklahoma City bombing defendant, seeks to enjoin the United States Navy from discharging him under the statutory policy colloquially known as "Don't Ask, Don't Tell, Don't Pursue." See 10 U.S.C. § 654 ("new policy"). In the course of investigating his sexual orientation, the Plaintiff contends that the Defendants violated his rights under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 *et seq.*, the Administrative Procedure Act ("APA") 5 U.S.C. § 706, the Department's own policy, and the Fourth and Fifth Amendments of the U.S. Constitution. Absent an injunction, the Plaintiff avers that he will suffer irreparable injury from the discharge, even if he were ultimately to prevail on the merits of his claims.

STATEMENT OF FACTS

The Plaintiff, Senior Chief Timothy R. McVeigh, is a highly decorated seventeen-year

veteran of the United States Navy who has served honorably and continuously since he was nineteen years old. At the time of the Navy's decision to discharge him, he was the senior-most enlisted man aboard the United States nuclear submarine U.S.S. Chicago.

On September 2, 1997, Ms. Helen Hajne, a civilian Navy volunteer, received an electronic mail ("email") message through the America Online Service ("AOL") regarding the toy-drive that she was coordinating for the Chicago crew members' children. The message box stated that it came from the alias "boysrch," but the text of the email was signed by a "Tim." Administrative Record ("AR") at 110. Through an option available to AOL subscribers, the volunteer searched through the "member profile directory" to find the member profile for this sender. The directory specified that "boysrch" was an AOL subscriber named Tim who lived in Honolulu, Hawaii, worked in the military, and identified his marital status as "gay." See AR at 111. Although the profile included some telling interests such as "collecting pics of other young studs" and "boy watching," it did not include any further identifying information such as full name, address, or phone number. However, on other occasions, Hajne had communicated with the Plaintiff about his participation in the drive.

Ms. Hajne proceeded to forward the email and directory profile to her husband, who, like Plaintiff, was also a noncommissioned officer aboard the U.S.S. Chicago. The material eventually found its way to Commander John Mickey, the captain of the ship and Plaintiff's commanding officer. In turn, Lieutenant Karin S. Morean, the ship's principal legal adviser and a member of the Judge Advocate General's ("JAG") Corps was called in to investigate the matter. By this point, the Navy suspected the "Tim" who authored the email might be Senior Chief Timothy McVeigh. Before she spoke to the Plaintiff and without a warrant or court order,

Lieutenant Morean requested a Navy paralegal on her staff, Legalman First Class Joseph M. Kaiser, to contact AOL and obtain information from the service that could "connect" the screen name "boysrch" and accompanying user profile to McVeigh. See AR at 13. Legalman Kaiser called AOL's toll-free customer service number and talked to a representative at technical services. Legalman Kaiser did not identify himself as a Naval serviceman. According to his testimony at the administrative hearing, he stated that he was "a third party in receipt of a fax sheet and wanted to confirm the profile sheet, [and] who it belonged to." AR at 14. The AOL representative affirmatively identified Timothy R. McVeigh as the customer in question. See id at 11-15.

Upon verification from AOL, Lieutenant Morean notified Senior Chief McVeigh that the Navy had obtained "some indication[] that he made a statement of homosexuality" in violation of § 654 (b)(2) of "Don't Ask, Don't Tell." AR at 27-28. In light of the Uniform Code of Military Justice prohibition of sodomy and indecent acts, she then advised him of his right to remain silent.¹ See id. at 28, 30. Shortly thereafter, in a memorandum dated September 22, 1997, the Navy advised Plaintiff that it was commencing an administrative discharge proceeding (termed by the Navy as an "administrative separation") against him. The reason stated was for "homosexual conduct, as evidenced by your statement that you are a homosexual." AR at 107.

On November 7, 1997, the Navy conducted an administrative discharge hearing before a three-member board. At the hearing, the Plaintiff made an unsworn oral statement that explained

¹ Plaintiff suggests that Lieutenant Morean acted inappropriately somehow when she advised Plaintiff of his rights at this time. The Court finds no merit to this claim. Given the state of the investigation against the Plaintiff, it was appropriate in all respects for Lieutenant Morean to have given Plaintiff a warning.

the substance of his email to Ms. Hajne, and thus by inference confirmed his authorship of the correspondence. See AR at 84. The Plaintiff presented evidence of a prior engagement to a woman and several other heterosexual relationships to rebut the presumption of homosexuality, pursuant to § 654(b)(2). See AR at 82-84. This evidence was rejected by the Board. At the conclusion of the administrative hearing, the board held that the government had sufficiently shown by a preponderance of the evidence that Senior Chief McVeigh had engaged in "homosexual conduct," a dischargeable offense.

The Navy accelerated Plaintiff's separation to take effect at 5:00 a.m. EST on Friday, January 16, 1998. On January 15, Plaintiff commenced this lawsuit and the government postponed his separation until Wednesday, January 20. This Court held a hearing on that Wednesday morning. There, the Navy initially declined to honor this Court's request for an additional amount of time to consider this matter. The Plaintiff was scheduled to be discharged on Friday, January 23. However, on January 22, the Navy extended the time for this Court to render a decision until Tuesday, January 27, when Plaintiff is now scheduled to be discharged barring relief from this Court.

ANALYSIS

STANDARD FOR PRELIMINARY INJUNCTION

To prevail on a request for preliminary injunction, the plaintiff must demonstrate 1) a substantial likelihood of success on the merits; 2) irreparable harm or injury absent an injunction; 3) less harm or injury to the other parties involved; and 4) the service of the public interest. See Dendy v. Washington Hosp. Center, 581 F.2d 990, 992 (D.C. Cir. 1978) (footnote omitted); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir.

1977). For the reasons set forth below, this Court concludes that the Plaintiff is entitled to the relief that he seeks at this time, a preliminary injunction barring his discharge.

I. Substantial Likelihood of Success on the Merits

Plaintiff in this case demonstrates a likely success to prevail on the merits. At its core, the Plaintiff's complaint is with the Navy's compliance, or lack thereof, with its new regulations under the "Don't Ask, Don't Tell, Don't Pursue" policy. Plaintiff contends that he did not "tell," as prescribed by the statute, but that nonetheless, the Navy impermissibly "asked" and zealously "pursued."

In short, this case raises the central issue of whether there is really a place for gay officers in the military under the new policy, "Don't Ask, Don't Tell, Don't Pursue." Although there have been a series of challenges to the constitutionality of the statute that codifies the policy, see, e.g., Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), cert. denied, 117 S.Ct. 358 (1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S.Ct. 45 (1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996), civil courts thus far have not interpreted the requirements of the statute assuming its constitutionality. The limits on the Navy's right to investigate sexual orientation and the restrictions on an officer's right to be a gay man or woman in the military—i.e., what it practically means not to ask, not to tell, and not to pursue—have yet to be litigated in the courts.

In 1993, leaders of Congress and the President reached a compromise designed to recognize the important role that officers who happen to be gay play in the defense of our nation. See Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on Armed Services, 103d Cong. 595 *et. seq.* (1993) (statements of General Colin

Powell, Chair of the Joint Chiefs of Staff, Admiral David Jeremiah, Navy, and General Merrill McPeak, Air Force). While the heads of the Armed Forces expressed fear that unit cohesion and military preparedness would be compromised by openly gay conduct, they acknowledged that homosexuality itself was not necessarily incompatible with military service. The statute that came to embody this position, "Don't Ask, Don't Tell, Don't Pursue," was specifically drafted to allow members of the military to live private lives as gay men and women, so long as their sexual orientation remained unspoken.

The facts as stated above clearly demonstrate that the Plaintiff did not openly express his homosexuality in a way that compromised this "Don't Ask, Don't Tell" policy. Suggestions of sexual orientation in a private, anonymous email account did not give the Navy a sufficient reason to investigate to determine whether to commence discharge proceedings. In its actions, the Navy violated its own regulations. See Guidelines for Fact-Finding Inquiries Into Homosexual Conduct, Department of Defense Directive No. 1332.14 ("Guidelines"). An investigation into sexual orientation may be initiated "only when [a commander] has received credible information that there is a basis for discharge," such as when an officer "has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts." Id. Yet in this case, there was no such credible information that Senior Chief McVeigh had made such a statement. Under the Guidelines, "credible information" requires more than "just a belief or suspicion" that a Service member has engaged in homosexual conduct. Id. In the examples provided, the Guidelines state that "credible information" would exist in this case only if "a reliable person" stated that he or she directly observed or heard a Service member make an oral or written statement that "a reasonable

person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts." *Id.*

Clearly, the facts as stated above in this case demonstrate that there was no such "credible information." All that the Navy had was an email message and user profile that it suspected was authored by Plaintiff. Under the military regulation, that information alone should not have triggered any sort of investigation. When the Navy affirmatively took steps to confirm the identity of the email respondent, it violated the very essence of "Don't Ask, Don't Pursue" by launching a search and destroy mission. Even if the Navy had a factual basis to believe that the email message and profile were written by Plaintiff, it was unreasonable to infer that they were necessarily intended to convey a propensity or intent to engage in homosexual conduct. Particularly in the context of cyberspace, a medium of "virtual reality" that invites fantasy and affords anonymity, the comments attributed to McVeigh do not by definition amount to a declaration of homosexuality. At most, they express "an abstract preference or desire to engage in homosexual acts." *See* Guidelines. Yet the regulations specify that a statement professing homosexuality so as to warrant investigation must declare "more than an abstract preference or desire"; they must indicate a likelihood actually to carry out homosexual acts. *Id.*

The subsequent steps taken by the Navy in its "pursuit" of the Plaintiff were not only unauthorized under its policy, but likely illegal under the Electronic Communications Privacy Act of 1986 ("ECPA"). The ECPA, enacted by Congress to address privacy concerns on the Internet, allows the government to obtain information from an online service provider— as the Navy did in this instance from AOL — but only if a) it obtains a warrant issued under the Federal Rules of Criminal Procedure or state equivalent; or b) it gives prior notice to the online

subscriber and then issues a subpoena or receives a court order authorizing disclosure of the information in question. See 18 U.S.C. § 2073 (b)(A)-(B), (c)(1)(B).

In soliciting and obtaining over the phone personal information about the Plaintiff from AOL, his private on-line service provider, the government in this case invoked neither of these provisions and thus failed to comply with the ECPA. From the record, it is undisputed that the Navy directly solicited by phone information from AOL. Lieutenant Karin S. Morean, the ship's principal legal counsel and a member of the JAG corp, personally requested Legalman Kaiser to contact AOL and obtain the identity of the subscriber. See AR at 13. Without this information, Plaintiff credibly contends that the Navy could not have made the necessary connection between him and the user profile which was the sole basis on which to commence discharge proceedings.

The government, in its defense, contends that the Plaintiff cannot succeed on his ECPA claim. It argues that the substantive provision of the statute that Plaintiff cites, 18 U.S.C. § 2703 (c)(1)(B), puts the obligation on the online service provider to withhold information from the government, and not vice versa. In support of its position, Defendants cite to the Fourth Circuit opinion in Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996), which held that § 2703 (c)(1)(B) only prohibits the actions of online providers, not the government. Accordingly, Defendants allege that Plaintiff has no cause of action against the government on the basis of the ECPA.

Under the circumstances of this case, it is unlikely that the government will prevail on this argument. Section 2703 (c)(1)(B) must be read in the context of the statute as a whole. In comparison, § 2703 (a) and (b) imposes on the government a reciprocal obligation to obtain a warrant or the like before requiring disclosure. It appears from the face of the statute that all of the subsections of § 2703 were intended to work in tandem to protect consumer privacy. Even if,

however, the government ultimately proves to be right in its assessment of § 2703(c)(1)(B), the Plaintiff has plead § 2703 (a) and (b) as alternative grounds for relief. In his claim that the government, at the least, solicited a violation of the ECPA by AOL, the Court finds that there is likely success on the merits with regard to this issue. The government knew, or should have known, that by turning over the information without a warrant, AOL was breaking the law. Yet the Navy, in this case, directly solicited the information anyway. What is most telling is that the Naval investigator did not identify himself when he made his request. While the government makes much of the fact that § 2703 (c)(1)(B) does not provide a cause of action against the government, it is elementary that information obtained improperly can be suppressed where an individual's rights have been violated. In these days of "big brother," where through technology and otherwise the privacy interests of individuals from all walks of life are being ignored or marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed.

The government has produced no evidence that would indicate that it would have proceeded without this information from AOL affirmatively linking the email to Senior Chief McVeigh. That the Plaintiff may have made incriminating statements at the subsequent administrative hearing does not bootstrap the Navy out of its legal dilemma of not only violating its own policy, but also a federal statute in its attempt to charge the Plaintiff with homosexuality.

In Plaintiff's case, this Court finds that the Navy has gone too far. The "Don't Ask, Don't Tell, Don't Pursue" policy was clearly aimed at accommodating gay men and women in the military. In effect, it was intended to bring our nation's armed forces in line with the rest of society, which finds discrimination of virtually every form intolerable. It is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace. At

this point in history, our society should not be deprived of the many accomplishments provided by people who happen to be gay. The "Don't Ask, Don't Tell, Don't Pursue" policy was a bow to society's growing recognition of this fact. For the policy to be effective, it has to be implemented in a sensitive, balanced manner. Under the policy as it stands today, gay service members must be permitted to serve their country honorably, so long as they are discrete in pursuing their personal lives.

In this case, the Plaintiff has had an exemplary service record for some seventeen years. Indeed, he has risen in the ranks to become the most senior non-commissioned officer on his ship. His evaluations have been of the highest order. Nothing has been produced before this Court which would in any way suggest that his sexual orientation has adversely affected his job performance. Senior Chief McVeigh's place in the Navy might even be characterized by some to be the very essence of what was hoped to be achieved by those who conceived the policy. The Plaintiff is no less an officer today than he was on January 5, 1998, the day before he was told of his imminent discharge from the Navy because of his sexual orientation.

As this Court stated in Elzie v. Aspin, 897 F. Supp 1, 3 (1995), it cannot understand why the Navy would seek to discharge an officer who has served his country in a distinguished manner just because he might be gay. Plaintiff's case "vividly underscores the folly . . . of a policy that systematically excludes a whole class of persons who have served this country proudly and in the highest tradition of excellence." *Id.* at 4. Although this case specifically does not reach any of the constitutional issues underscoring the "Don't Ask, Don't Tell, Don't Pursue" policy, see Able v. United States, 968 F. Supp. 850 (1997), the Court must note that the defenses mounted against gays in the military have been tried before in our nation's history — against

blacks and women. See Elzie v. Aspin, 841 F. Supp. 439, 443 (1993). Surely, it is time to move beyond this vestige of discrimination and misconception of gay men and women.

II. Irreparable Harm

Without this Court's immediate intervention, the Plaintiff will lose his job, income, pension, health and life insurance, and all the other benefits attendant with being a Naval officer. Having served honorably for the last seventeen years, Plaintiff will be separated from a position which is central to his life on the sole ground that he has been labeled a "homosexual," and thus by definition unfit for service. The stigma that attaches to such an accusation without substantiation is significant enough that this Court believes it must grant the injunctive relief sought. In cases nearly identical to this, courts have accordingly granted a preliminary injunction, see Elzie v. Aspin, 841 F. Supp. 439, 443 (D.D.C. 1993) (loss of benefits and "rights as a Marine" constitute irreparable harm); May v. Gray, 708 F. Supp. 716, 719 (E.D.N.C. 1988) (same); see also Saunders v. George Washington University, 768 F. Supp. 843, 845 (D.D.C. 1991); Huynh v. Carlucci, 679 F. Supp. 61, 67 (D.D.C. 1988).

III. Harm to other Parties

In contrast to the serious injury that Plaintiff immediately faces if discharged, there is no appreciable harm to the Navy if Senior Chief McVeigh is permitted to remain in active service. Indeed, the Navy will only be enhanced by being able to retain the Plaintiff's seventeen years of service experience.

IV. Public Interest

Certainly, the public has an inherent interest in the preservation of privacy rights as advanced by Plaintiff in this case. With literally the entire world on the world-wide web,

enforcement of the ECPA is of great concern to those who bare the most personal information about their lives in private accounts through the Internet. In this case in particular, where the government may well have violated a federal statute in its zeal to brand the Plaintiff a homosexual, the actions of the Navy must be more closely scrutinized by this Court. It is disputed in the record exactly as to how the Navy represented itself to AOL when it requested information about the Plaintiff. The Defendants contend that Legalman Kaiser merely asked for confirmation of a fax sheet bearing Plaintiff's account. Plaintiff contends, and AOL confirms, however, that the Naval officer "mislead" AOL's representative by "both failing to disclose the identity and purpose [of his request] and by portraying himself as a friend or acquaintance of Senior Chief McViegh's." See AOL Statement on the Matter of Timothy McVeigh, Ct. Ex. 1. At the final injunction hearing, this issue should be fully explored.

The Court believes that when this case is finally determined, it will become clear that the case will be able to be disposed on the basis of the "Don't Ask, Don't Tell, Don't Pursue" policy. This provision draws a fine balance between the interests of gay service members and the Armed Forces. It is a way of permitting gay women and men to serve in the Armed Forces, a right that the military did not provide them prior to the adoption of "Don't Ask, Don't Tell, Don't Pursue."

To make the policy work requires each of the parties to refrain from taking certain actions. Under the provisions of the policy, if the gay member agrees to remain silent about his or her sexual orientation, he or she is permitted to serve. For its part under the policy, the military is required to refrain from asking any of its members about their sexual orientation or pursuing an inquiry into a member's sexual orientation without a reasonable basis in fact. So far, pursuant to the record developed in this case, while Plaintiff complied with the requirements

imposed upon him under "Don't Ask, Don't Tell, Don't Pursue," the Defendant went further than the policy permits. Although Officer McVeigh did not publicly announce his sexual orientation, the Navy nonetheless impermissibly embarked on a search and "outing" mission. Therefore, when this case is finally heard, if the record remains as it is now, the Plaintiff will likely prevail. It is accordingly for this reason that a preliminary injunction will issue. An appropriate order follows.

1/26/96

Date

Stanley Sporkin
Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

FILED
JAN 16 1998

Civil Action No. 98-116
Judge Stanley Sporkin

ORDER

For the reasons set forth in the opinion above, it is hereby

ORDERED that good cause having been shown pursuant to Rule 65 of the Federal Rules of Civil Procedure that immediate and irreparable injury and damage will result to Plaintiff before a trial on the merits can be heard and decided, that Plaintiff's Motion for a Preliminary Injunction is **GRANTED**; and it is

FURTHER ORDERED that Defendants, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise, shall be preliminarily enjoined from taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiff's Naval Service, on the basis of his alleged sexual orientation pending final resolution of Plaintiff's Complaint; and it is

FURTHER ORDERED that the parties shall appear before this Court on January 29, 1998 at 10:00 in Courtroom 6 for a status conference, at which time a briefing schedule and date

for a hearing on final injunctive relief will be determined.

1/21/98

Date

Stanley Sporkin

Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 30 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

Civil Action No. 98-116
Judge Stanley Sporkin

ORDER

At the hearing held by this Court on January 29, 1998 to determine what further litigation would be necessary to resolve this matter, it was agreed by the parties that the present record was sufficient and that the Court could make a final determination. Accordingly, it is hereby

ORDERED that Defendants, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise, shall be permanently enjoined from taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiff's Naval Service, on the basis of his alleged sexual orientation so long as Plaintiff is in compliance with 10 U.S.C. § 654 and relevant regulations as interpreted by this Court in its January 26, 1998 opinion; and it is

FURTHER ORDERED that the parties shall appear before this Court on March 4, 1998 at 10:00 in Courtroom 6 for a status conference to rule on Plaintiff's request for attorneys' fees and costs, with the parties' submissions on these matters being filed before that date, and to

(2)

12

consider any other matters that may be properly before the Court at that time.

1/29/98

Date

6:15 P.M.

Stanley Sporkin

Stanley Sporkin
United States District Judge

Congress of the United States
House of Representatives
Washington, DC

MEMORANDUM

TO: Hon. Seth Waxman
Solicitor General

FROM: Barney Frank *pf*

RE: Timothy McVeigh

DATE: March 18, 1998

As I discussed with you, we are still looking for the Q and A that was released by DOD in connection with the development of the new gays-in-the-military policy. However, I wanted to bring to your attention statements made by former Secretary Les Aspin and General Colin Powell during the Senate hearings in the summer of 1993. These are particularly relevant to the Navy's conduct in this case, and provide strong support for a decision on your part not to appeal Judge Sporkin's injunction in this case:

Secretary Aspin:

- "...[C]ommanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation.
- "Commanders will consider, in allocating scarce investigative resources, that sexual orientation is a personal and private matter.

Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services, 103rd Cong., 2d Sess. (1993) at 700-703 (statement of the Honorable Les Aspin, Secretary of Defense).

General Powell

- "We won't witch hunt. We won't chase. We will not seek to learn orientation."

Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell).

In this case, the Navy violated the spirit and letter of these statements. A Navy investigator, without identifying himself, contacted America Online to determine the identity of someone who had posted a profile on AOL anonymously. The Navy did so because of gay-

related statements in the AOL profile. The Navy sought to identify the person behind that profile solely to determine the sexual orientation of Senior Chief (Petty Officer) Timothy McVeigh, whom the Navy suspected of having posted the profile.

April 28, 1998

Rob,

You asked me to find any discretionary decisions or factors in the Navy retirement system. The retirement procedures carefully set forth what each retiring member is entitled to in terms of retirement pay. The retirement pay is dependent on two factors: length of service and pay rate at the time of retirement. There does not appear to be any way to increase McVeigh's length of service. Therefore to increase his retirement pay we should try to increase his rate of pay. The following is a list of possible ways to increase his rate of pay:

1. Promotion to E-9.
2. Special or Incentive Pay

Some of the special and incentive pay regulations state that members *may* qualify for special or incentive pay and only set forth payment caps. There is the possibility that McVeigh was not given each special pay that he was qualified for or not given the maximum amount for each special pay. If so, he could be retroactively granted each special or incentive pay or be given the difference between the amount he actually received and the maximum amount available. Section 1552 of title 10 permits the Secretary of a military department to "correct any military records . . . when the Secretary considers it necessary to correct an error or remove an injustice."

The following are the special or incentive pay that McVeigh may have been qualified for:

Enlistment bonus - *may* be paid to an enlistee when the enlistee enlists for a period of 4 or more years for the purpose of qualifying and serving in a military specialty designated as critical and is either a "non-prior service enlistee" or a "prior service enlistee." Enlistment bonus shall not be more than \$12,000. See ¶¶ 090101 A-B; 090102; 37 U.S.C. § 308a.

Re-enlistment bonus - "A member of the uniformed service who has completed at least twenty-one months of continuous active duty . . . but not more than fourteen years of active duty; is qualified in a military skill designated as critical by the Secretary of Defense . . . ; is not receiving special pay under section 312a of this title [duty in nuclear propulsion plants]; and reenlists or voluntarily extends his enlistment in a regular component of the service *may* be paid a bonus" 37 U.S.C. § 308(a)(1).

Submarine duty - "a member of the naval service who is entitled to basic pay but is not entitled to continuous monthly submarine duty incentive pay under paragraph (1) is entitled to submarine duty incentive pay in the amount set forth in subsection (b) for any period during which such member performs frequent and regular operational submarine duty (as defined in paragraph (5)) required by orders." 37 U.S.C. § 301c(a)(2).

Career sea pay - "a member of a uniformed service who is entitled to basic pay is also entitled, while on sea duty, to special pay at the applicable rate" 37 U.S.C. § 305a.

Sea duty - special pay - a member entitled to basic pay who is in pay grade E-4 or above *may* be entitled to career sea pay for sea duty as defined in paragraph 180103. See DoD Financial Management Regulations ¶ 180101.

Special duty assignment pay - enlisted member entitled to basic pay *may* qualify, when

April 28, 1998

member performs duties designated by the Secretary concerned as extremely difficult or involving an unusual degree of responsibility. The maximum pay may not exceed the pay set forth in ¶ 080105 B. See DoD Financial Management Regulations ¶ 080101 B.

3. Correction of military record under section 1552 of title 10 of the U.S. Code.

This section may provide grounds to increase McVeigh's pay or increase his rank, based on the discretionary finding of the Secretary of the Navy that some "error" or "injustice" occurred. It is not clear whether the rank needs to be increased in order to receive the benefits comensurate with that rank.

Sean
ext. 65068

~~I have been~~

any to John MIL BETA
has been in
want more
fl

SIGNORILE IN AMERICA

An Internet Call to Arms

ON THE MORNING of January 6, 34-year-old gay "cyber-activist" John Aravosis poured his morning coffee and sat down at the desk in his 11th-floor studio apartment in the Adams-Morgan section of Washington, D.C., overlooking the Washington monument and the Capitol. He booted up his Toshiba laptop, logged online, and opened an e-mail message originating from another young man several time zones away, in Hawaii, that was forwarded by gay journalist Rex Wockner to Aravosis' e-mail list:

Subject: Request for your help. Message: My name is Tim and I have recently been recommended for discharge from the United States Navy for merely having the word 'gay' in one of my America Online profiles.

The message also gave the address for the home page that the man, Timothy McVeigh—no relation to the Oklahoma City bomber—had created for people who wanted to offer him assistance (<http://www.geocities.com/Pentagon/9241>).

Since queer, grassroots direct action fizzled in the early '90s, people like Aravosis have quietly been pioneering the new activism: online organizing. The energy that exploded on the streets a few years ago has moved into cyberspace, and Aravosis had been looking for the next flash point to grab attention. He saw it here: In Tim McVeigh's case, the red-hot issue of online privacy could relight a fire under the gays-in-the-military story, a topic the media had grown tired of in the

past several years, practically ignoring the massive numbers of new discharges—850 in 1996 alone.

Even Aravosis, however, could not have predicted that that particular e-mail would kick off one of the highest-profile skirmishes in the ongoing gays-in-the-military debacle. He put the military's "don't ask, don't tell" policy under intense

charge, to mobilize. Sitting in his quarters in Hawaii, panicking as the clock ticked away the 10 days he had before discharge, and waiting while his lawyers sought a temporary injunction, he chafed at the injustice AOL had done to him. "I thought it was important that people on America Online had that information, so I sent an e-mail out to everyone who

had 'gay' in their profile," McVeigh tells me, "I asked them to send it on to people who were interested in human rights."

When that message reached Aravosis, he zeroed in on a salient fact: McVeigh was being discharged under "don't ask, don't tell," even though he never told. Last fall, McVeigh apparently by accident sent a message under a private screen name, "Boysrch," to a colleague's wife, offering his help in a drive to get Christmas gifts to underprivileged children. She checked the profile and saw the word "gay." The e-mail was eventually forwarded to McVeigh's superiors. But McVeigh had not identified himself by his full name in the message or in the screen name's profile. The Navy could only confirm that the screen name belonged to Mc-

Veigh's account by contacting America Online. And an AOL employee gave out the information, apparently violating both the company's own policy and the federal Electronic Communications Privacy Act of 1986.

Aravosis posted commentaries with titles such as "Is AOL Violating Your Privacy?" to various websites, activist e-mail



scrutiny by both the media and the federal judiciary, and then jump-started an intense discussion all over America and around the world about online privacy. The media missed the back story, however: Cyberactivist power had arrived.

MCVEIGH HIMSELF HAD used AOL, the very service that facilitated his dis-

Contributing writer Michelangelo Signorile, author of *Life Outside* (HarperCollins), can be reached at his home page, <http://www.gaywired.com/signorile>.

lists, newsgroups, and bulletin boards. Angry, concerned e-mails began to pour in from people offering their support and assistance. They also began to furiously e-mail AOL, members of Congress, and the White House.

Message: "I am a straight male, 31, who believes it is no one's business about your preferences . . . If you are willing to fight and support our country, then what difference does it make?"

Message: "I am a lifelong, staunch supporter of the military establishment, a person who promotes conservative values within our society, but I am absolutely appalled that self-righteous bigots [in the armed forces] are using the military to attack our wonderful country from within."

Aravosis challenged Net heads to "think about who might be next" to find their online privacy invaded. He brought queer activism to another level, motivating many straights who are normally apathetic to gay rights. Support came from as far off as New Zealand and India. The whole world was watching.

A critical mass of activists began to build. The Servicemembers Legal Defense Network (SLDN), on the case since October, provided Aravosis with stats and legal briefs. The Gay and Lesbian Alliance

he notes. "I think AOL was concerned enough about the gay community's response to this. They're quite aware that the gay and lesbian community [constitutes] a large amount of their users." AOL eventually admitted its wrongdoing.

Two weeks into the online battle, the Human Rights Campaign put McVeigh's plight on its website and made it easy for people to e-mail Congress and the White House with the push of a button or two. Several members of Congress spoke out against the Navy's actions. As has happened with renegade Web journalists like Matt Drudge, the news bubbled up to the major print and television media—the *San Francisco Chronicle*, *The Washington Post*, *The New York Times*, *Time* magazine, NBC, ABC, CNN, and others. McVeigh was becoming the latest gay cause célèbre, all due to cyberorganizing.

At this point Aravosis shifted his strategy. Now that the media had reporters on the story, the activists could steer them toward the issue of antigay discrimination in the military. The Navy, realizing it had been caught with its pants down by asking for McVeigh's screen name, postponed his discharge for a few days, pending the results of a court hear-

Navy only with the option of appealing the ruling. "All that the Navy had was an e-mail message and user profile that it suspected was authored by Plaintiff," the judge stated. "In these days of Big Brother, where through technology and otherwise the privacy interests of individuals from all walks of life are being ignored or marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed."

Not only was the ruling a major victory for online privacy, it was the biggest gay political story in a long while and probably the greatest attack on "don't ask, don't tell" so far. "It's a significant step. This decision did not challenge the constitutionality of the policy, but it's the first time that a judge ruled that the Pentagon has gone too far," explains C. Dixon Osburn, co-executive director of SLDN. "And I think that's one of the things that captured the imaginations of Americans, too."

JOHN ARAVOSIS HAS created this kind of pressure before. A former aide to Republican senator Ted Stevens of Alaska, he knows both Washington and the Web like the back of his hand. For the past year he has run his own business, Wired Strategies, a one-man operation out of his apartment. "I offer strategic consulting," he explains of his work with the American Civil Liberties Union, AIDS Action, and the National Education Association. "I consult organizations on how to use the online community to influence Congress—cyberlobbying. But it's also about figuring out how each individual organization can use the Web to its advantage."

Yet the McVeigh story was a bit different from his other work. The brouhaha required constant feeding, taking all of his time, unpaid, for four weeks. The case also required the kind of swift, aggressive, guerrilla activism that groups like ACT UP performed in the '80s to bring media attention to gay issues—except, in this case, it was done not by hundreds of people marching on a building but rather each individual connecting with others through his or her computer.

Back in 1991, PlanetOut visionary Reilly predicted this kind of activism. One of his goals in founding PlanetOut was, in fact, to facilitate activism with the push of a button. (continued on page 138)

Who could have predicted that one e-mail would sic the media on "don't ask, don't tell" and jump-start an intense discussion all over America about online privacy? Cyberactivist power had arrived.

Against Defamation put the case on its media alert. Barbara Bode, a lesbian cyberactivist, helped coordinate online strategy. Gay presidential appointee Bob Hattoy put pressure on the White House to intervene. David Sobel, an Internet privacy lawyer with the Electronic Privacy Center, decried the egregious invasion of privacy. PlanetOut, a queer website with 400,000 regular visitors, put an action alert on their front page.

Tom Reilly, who as PlanetOut's CEO is bankrolled by AOL dollars, immediately called AOL executives. "I told them, 'You are not coming off well to my constituency and to the American public. You have to find out if you did wrong, and then you have to apologize,'"

ing. Aravosis then sent out missives targeting the Navy and underscoring the Navy's policy. Editorials immediately began appearing in newspapers across the country, in places such as Moline, Illinois, and Tulsa, Oklahoma, attacking the "don't ask, don't tell" policy, and network television news became equally forceful in focusing on the policy once again.

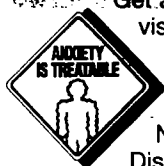
On January 26, just 20 days after Aravosis had first read McVeigh's e-mail plea for help, U.S. District Court judge Stanley Sporkin granted McVeigh's motion for a preliminary injunction, keeping McVeigh on active duty until the entire lawsuit was resolved. In an unusual move the next day, Sporkin made the injunction permanent, leaving the

Do you experience these symptoms of Anxiety?

- Excessive worrying
- Feeling keyed up
- Anxiety attacks
- Obsessions or compulsions
- Muscle tension
- Problems with concentration
- Unexplained heart palpitations
- Phobias
- Sleeplessness
- Uncomfortable in social situations

If the answer is yes, take a FREE anxiety screening on May 6, 1998

Get a free confidential visit with a doctor or mental health professional. To find a National Anxiety Disorders Screening Day site nearest you, **Call 1-888-442-2022**



NATIONAL ANXIETY DISORDERS SCREENING PROJECT

SIGNORILE (continued from page 52)

as Reilly put it. The Net can be used not only to organize people who don't enjoy more traditional activism—writing and mailing letters, engaging in civil disobedience—but it can also be a great tool to help people come out of the closet. Online, he predicted, people would be able to find out enormous amounts of information about being gay or lesbian and could then come out at their own pace, making friends with people in chat rooms and on bulletin boards, finding people with like interests. And those people, while finding their way and coming out, could also be brought to activism—what Reilly calls the “armies of the closeted.”

Much of this has been realized far faster than imagined, but there have been downsides to cyberspace that haven't quite lived up to the utopian vision. It has become so easy for closeted people, including those in unhappy heterosexual marriages, to find gay sex on the side by simply logging on to a chat room that many may never be challenged to change their unhappy situations, let alone speak up against homophobia.

McVeigh's case points out another downside: Many of us, every day, go online and unwittingly document all sorts of personal information about ourselves, from our finances to our innermost sexual fantasies, often under screen names that we believe are private. But at any time, such information may be accessible to law enforcement. You don't have to be a conspiracy theorist to get paranoid.

Still, Reilly and other activists rightly view the upsides to online technology as greater than any of the downsides. The religious Right has been far slower in organizing its people online, Reilly notes, particularly since its demographic is often older and less cyberliterate—all those blue-haired Christian women are good at writing and mailing complaint letters to Disney, but they're not so plugged in to the Net.

“The activist potential is enormous,” Reilly comments. “We have not even tapped one tenth of it yet. We have new generations coming up and coming out and getting online. For many gay people, the future will be about waking up, checking their e-mail, and doing battle—and being victorious.” For some activists, like John Aravosis, that future has already come. ■

TALES (continued from page 88)

recalls, “I'd just gotten dumped and was feeling really low, and Armistead said, ‘I've got a present for you.’ And he took a joint out of his wallet and gave it to me. I might have started crying, I'm not sure.”

Lest we imply making *More Tales* was nothing more than a fun-lovin' foray into worlds of dickage and doobage, it's important to note that the *Tales* team had their share of challenging dramatic moments to create as well. For starters, there's the scene in which Mouse, having been diagnosed with the potentially life-threatening Guillain-Barré syndrome, dictates a coming-out letter to his parents from a hospital bed, a letter that actually served as Maupin's own coming-out letter when it was originally published in the *Chronicle*.

“It was a bit daunting,” Hopkins says of the scene, “and I was exhausted by the end of the day. After that, I went home to Ottawa to see my friends, and I wore my hospital band for two weeks. I just didn't want to take it off.”

“When I chose this ailment, I had no inkling what was on the way,” Maupin says, when asked if he sees Mouse's Guillain-Barré as a harbinger of AIDS. “I wanted to create something that would really test a gay relationship and prove the depth of Jon's love for Michael. Four years ago, when we first talked of shooting this, there was some trepidation that people would feel we copped out if Michael recovered. In the interim, protease inhibitors have come along and very few people have trouble with the concept that someone with HIV might actually survive. Years ago, people would say to me, ‘I'm glad you're not writing *Tales* anymore, because Michael would be dead by now.’ Well, Michael tested positive at the same time as my partner, Terry, and Terry's still strapping and healthy. So it's wonderful to say, ‘Guess what? Mouse is alive and he's doing fine.’”

Back at the Nikko, I ask Campbell, 34, what he remembers about being a swinging single in a world without AIDS.

“I was mostly worried about getting somebody pregnant,” he admits, “and I kind of worried about herpes, but not much.”

“I was born too late and I missed out on all that,” says Hopkins, 29. “When I watched the first *Tales* and saw the bathhouse scenes, I really envied the liberality, not just of the '70s but of gay culture compared to straight.”

“If there was such a thing as hetero bathhouses,” I suggest, “would either of

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

MEMORANDUM

*Copy to JWH P
LAWA memo
Rus WHEWKE*

TO: SLDN Supporters
FROM: Michelle Benecke
DATE: April 9, 1998
RE: SLDN Obtains Good First Steps from DoD Review

The Pentagon has finally released its review of Don't Ask, Don't Tell, Don't Pursue. As you may recall, Secretary Cohen ordered this review one year ago in response to SLDN's annual report documenting continued asking, harassment and witch hunts against military members.

If we were grading the review, we would give its recommendations a "B." They address many of our concerns and represent a significant victory. We are particularly pleased that Secretary of Defense Cohen will instruct commanders not to tolerate anti-gay harassment and that he will reissue the 1997 "Dorn memo" telling commanders to investigate reports of anti-gay harassment, not those victimized by it. SLDN revealed this year that the services had failed to send this guidance to the field.

Commanders will also be required to seek guidance, and in some cases permission, from higher headquarters before beginning gay investigations and they will be evaluated yearly on whether they are properly training their units on this policy. Lack of training is one of the major problems with the implementation of this policy.

The Department of Defense will also issue guidance against the use of pretrial agreements in which service members convicted of serious crimes are given reduced sentences in exchange for outing alleged gay military members. This recommendation results from our longstanding work on the "Hawaii 17" witch hunt, in which we revealed this insidious practice.

These are good first steps. They respond directly to recommendations we have made in this process. Of course, we will vigilantly monitor the Pentagon to ensure these recommendations are implemented.

With regard to addressing the significantly increased discharges under this policy, however, we would give the Pentagon an "F." Unnamed officials have falsely claimed, with no proof, that the increase in gay discharges last year -- up to 997 from 850 the year before -- is due to people who freely came out in order to avoid military service.

This assertion is not contained in the review itself. The review actually admits that the Pentagon has no way to ascertain the facts of these cases. We do, and we have proven that commanders are asking, pursuing and harassing servicemembers out of the closet.

The increase in gay discharges to 997 represents a 17% increase over last year's figure of 850 and a 67% increase in discharges since this policy went into effect. This is the highest number of gay discharges since 1989 and the highest percentage since 1986.

The enclosed articles provide further information about the review and SLDN's work.

Thank you for your continued moral support. Pentagon spin aside, these recommendations will deter asking, witch hunts and harassment if implemented. Your help has made this possible.

Undone by 'Don't Ask, Don't Tell'

By Andrew Sullivan

I think it's working," said Defense Secretary William Cohen, referring to the Pentagon's "don't ask, don't tell" policy for gay members of the armed services. He said this while announcing that discharges of homosexuals have increased by 67 percent since 1994. When you factor in the military's downsizing, the real figure is closer to 80 percent. If this is Mr. Cohen's definition of success, one wonders what failure would look like.

The real picture is actually grimmer. Although "don't ask, don't tell" forbids military commanders from pursuing investigations of suspected homosexual conduct without compelling evidence, violations of the policy not to ask, pursue or harass homosexuals have soared, according to the Servicemembers Legal Defense Network, the only watchdog group tracking discharge cases under this policy.

The organization has documented 563 violations by military authorities of "don't ask, don't tell" in 1997, a jump from 443 violations in 1996. Reported cases of physical and verbal harassment of gay service members 38 percent from 1996 to 1997; in which military authorities illegally "asked" troops if they were gay increased 39 percent.

Until August of last year, the military was still even using enlistment forms that directly asked about a person's sexual orientation. In its report, the Pentagon said the original form was preserved for four years "as a cost savings measure."

Witch hunts have continued. In 1996, an airman convicted of forcible sodomy at Hickam Air Force Base had a life sentence reduced to 20 months in return for outing 17 other allegedly gay servicemen. All the accused air force men were discharged; the rapist served less than a year.

Andrew Sullivan, a senior editor at The New Republic, is the author of the forthcoming "Love Undetectable."

Secretary Cohen's improbable defense is that the vast majority of discharges were voluntary. The proof? None in the Pentagon report, except for this: "The Services believe that most of the [cases involving a disclosure of homosexuality] — although not all of them — involve service members who voluntarily elected to disclose their sexual orientation to their peers, supervisors or commanders."

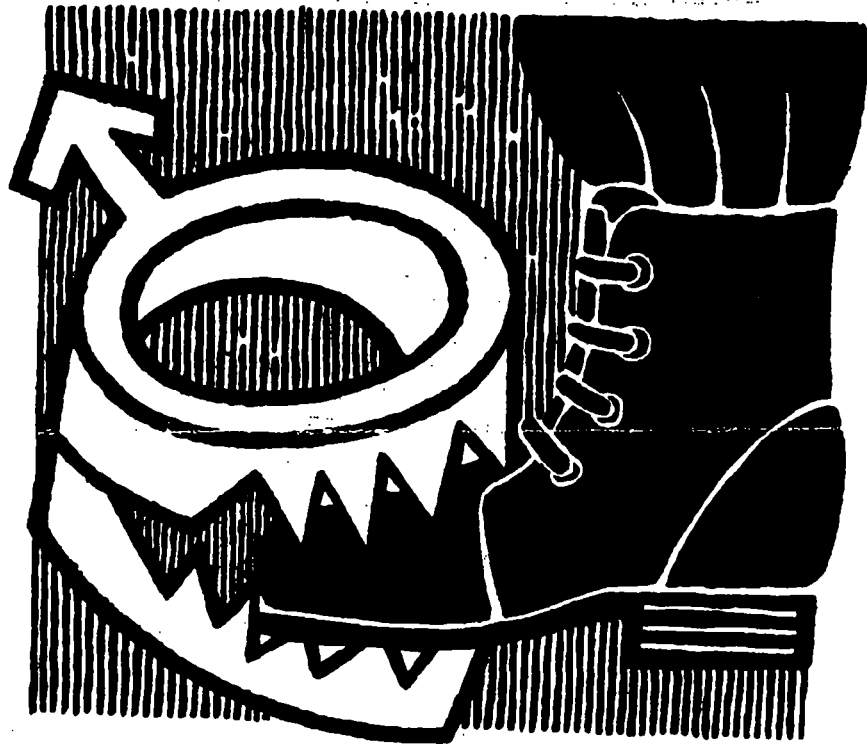
That's what it comes down to: "the Services believe..." The report later concedes that "because extensive inquiries or investigations are not conducted in most of these cases, the reasons for [the increase in numbers] are not known and would be difficult to ascertain." Compare this with the documentation of the Servicemembers Legal Defense Network.

The Pentagon further claimed that 80 percent of discharges were "statement" cases, implying that individuals were discharged after spontaneously declaring their orientation to their superiors. But that is misleading at best. All that a "statement" case means is that the grounds for discharge arose from what a service member allegedly said, and not what he or she did.

Such "statements" can include private confessions to therapists, friends, peers or family members that were subsequently reported to military authorities.

I asked Michelle Benecke, co-director of the Servicemembers Legal Defense Network, how many of the 1,300 people her group has helped in the last four years have truly voluntarily disclosed their orientation. "None that I've come across," she said.

To its credit, the Pentagon does



Luba Lukova

admit in its report that it has a problem. While insisting that the policy is "generally being implemented properly," the military concedes that it has not been vigilant enough in policing anti-gay harassment. As it now stands, someone attacked for being gay cannot report the abuse without risking discharge as a result.

The report also acknowledges that some women have been intimidated into not reporting sexual harassment, because they are sometimes accused of being lesbians if they reject male advances. More needs to be done to inform commanders of the regulations, the report adds.

These admissions would be more encouraging if the record was not so damning. Last year, despite the 563 reported violations of "don't ask, don't tell," not a single military commander was disciplined for misconduct.

It's now clear that the policy has not simply failed. It is far worse than

Under Clinton, things are worse for homosexuals in the military.

what went on before. Gay service members are now allowed into the military, only to face a series of tripwires intended to flush them out. I have become, in effect, the unintended bait of rogue military commanders. Other, more decent officers (there are many) simply do not know the rules, since the Pentagon has done a poor job of telling them.

What to do about this? The Pentagon has embraced a mix of spin, denial and confession. The President has other options. Last year, denounced employment discrimination against homosexuals. But as Commander in Chief, Bill Clinton fired more homosexuals than any other employer in America. Is it much to ask that this President finally live up to his own words? Or with this President, is that now utterly beside the point?

over →

Military Discharges of Homosexuals Soar

Rise of 67% Since the 'Don't Ask, Don't Tell' Policy Was Created

By TIM WEINER

WASHINGTON, April 6 — The military is discharging 67 percent more gay and lesbian troops today than when the Clinton Administration adopted its "don't ask, don't tell" policy, according to a Defense Department report to be issued later this month.

A total of 997 military personnel were discharged for homosexuality last year, the report says, compared with 597 in 1994, the first full year that the policy was in effect.

Gay rights advocates see those figures as evidence for their contention that homosexuals are being ousted and ousted in ever-larger numbers. They say gay and lesbian personnel are still subject to interrogation and harassment by commanders.

But Pentagon officials say they think the increase in discharges may be due to voluntary declarations of homosexuality — which the policy forbids — by men and women who want out of the military, although these officials acknowledge that nearly five years after the policy's adoption, some commanders still do not seem to understand it.

The policy — more fully, "don't ask, don't tell, don't pursue" — was intended to allow homosexuals to serve in the armed forces, while protecting not only troops' privacy but also the morale that the military says would be compromised by avowed homosexuality in the ranks.

Under it, recruiters are forbidden to ask prospective enlistees about their sexual orientation, gay and lesbian troops are forbidden to disclose their homosexuality, and commanders are forbidden to pursue investigations of suspected homosexual conduct in the absence of compelling evidence.

Pentagon officials said today that the forthcoming report, prepared by the office of the Under Secretary of Defense for Personnel, would recommend that commanders consult more closely with military lawyers before undertaking such investigations and that some senior officers receive retraining in the policy.

But the Secretary of Defense, William S. Cohen, suggested that the rise in discharges might be due in part to an increasing number of voluntary statements to commanders by homosexuals who want to leave the military, rather than to hostility directed

at gay and lesbian troops.

"There are some indications," Mr. Cohen said, "that there has been an increase as far as some of the people who have declared themselves to be homosexual and have opted to get out of the military."

Elaborating on that remark, Kenneth Bacon, the Pentagon spokesman, said in an interview: "We think the rise is almost exclusively explained by the increase in the numbers of people stating they are homosexuals. We think they are voluntary statements. We can only speculate as to why they are doing this."

Michelle M. Benecke, a former Army captain who is an advocate for gay and lesbian military personnel, disagreed.

"The discharges result from the fact that military leaders have not stopped asking and telling and pursuing," Ms. Benecke said. "We are nearly five years into this policy, but

Gay groups say hostility lingers. No, the Pentagon says.

military leaders have not seen fit to tell commanders what this policy is and what its intent is."

Ms. Benecke, co-director of the Servicemembers Legal Defense Network, said there was little formal training on the policy and the rules resulting from it.

"It is well documented that command violations are widespread in the field and that commanders have not been trained on the intent of the policy," she said. "Commanders are in the driver's seat without a road map. Others know the rules and are deliberately violating them."

Ms. Benecke cited the case of Senior Chief Petty Officer Timothy R. McVeigh, a 17-year sailor with a sterling record. The Navy's investigation of Petty Officer McVeigh went so far as to pry his E-mail messages out of his America Online account last year, before the service moved to discharge him.

"The Navy has gone too far," a Federal district judge, Stanley Sporkin, ruled in blocking the discharge

in January. "The Navy impermissibly embarked on a search and 'outing' mission" against the sailor, the judge found. The Navy filed a notice of appeal on March 31.

The "don't ask, don't tell" policy bars military personnel not only from avowal of homosexuality but also from homosexual acts and marriages. Discharges for acts and marriages have declined by about 20 percent in the last three years. Statements — declarations or acknowledgment of homosexuality — account for the rise in discharges, Mr. Bacon said.

Charles Moskos, a professor of sociology at Northwestern University who as a Pentagon consultant was widely regarded as the architect of the "don't ask" policy, said, "The core question is, Are the statements being generated by asking?"

Secretary Cohen commissioned the Pentagon report last year after the Servicemembers Legal Defense Network documented a surge in what it described as violations of the policy.

"I think it's working," Mr. Cohen said of the policy today. "We intend to continue to emphasize the fact that this policy should not be abused, that there should be no attempt to hunt or seek out those who may be homosexual, and that we intend to strictly enforce the 'don't ask, don't tell' policy."

The report will recommend that commanders "consult with legal officials before initiating investigations, in order to make sure they are carried out with proper respect for the subject's rights," Mr. Bacon said.

"It calls for reiterating an earlier guidance about how to deal with threats against service members accused of being homosexuals," he said. "And it recommends better training for all people involved in implementing the policy, to make sure everybody understands what the policy is."

Ms. Benecke said that under the policy, "harassment and witch hunts were supposed to end."

"But Pentagon leaders have not sent this message to the field," she said. "We have asked the Pentagon as a first step to inform commanders of the intent of this policy to respect people's privacy. Leaders need to hold their subordinates accountable for violations. Nearly five years into this policy, that has not occurred."

2210 RAYBURN BUILDING
WASHINGTON, DC 20515-2104
(202) 225-5931

29 CRAFTS STREET
NEWTON, MA 02158
(617) 332-3920

Congress of the United States
House of Representatives
Washington, DC

558 PLEASANT STREET
ROOM 309
NEW BEDFORD, MA 02740
(508) 999-6462

222 MILLIKEN PLACE
THIRD FLOOR
FALL RIVER, MA 02721
(508) 674-3551

89 MAIN STREET
BRIDGEWATER, MA 02324
(508) 697-9403

February 23, 1998

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Tenth Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Janet,

Thanks for talking with me about the notion of adopting a more appropriate level of scrutiny by which to measure official actions which in some way disadvantage gay men and lesbians. As I said, I believe adopting some intermediate level of scrutiny in place of the current rational basis test is a very important civil rights measure, and in fact is wholly consistent with the support for fair treatment of gay men and lesbians that has been a hallmark of this administration. As I also noted, while I continue to oppose the policy regarding gays in the military, I recognize that increase in the level of scrutiny would have no implications for the government's ability to defend that policy. Since the military has been able to defeat even First Amendment claims, it would be perfectly consistent for the administration to argue for some intermediate level of scrutiny and still support the current policy as justified by the special concerns of the military. Having a much higher level of scrutiny than rational basis has clearly not required that the military stop all different treatment of women, for example.

This is a very high priority for me and I think it is an important step for the administration to take in carrying out one of the policy goals the President has articulated. I'll await hearing from you about how best to proceed, but my staff and I are eager to work with the Justice Department in advancing this notion.


BARNEY FRANK

to C. Rott
Copy to Pres *W. W. W. W.*

KVC
P. S. Schwartz
6-16-11

Cumy to Mount M. Rob W.
fux to Rasy ncl + Rur T. QROP

Cracking under pressure?

Are Pentagon officials
really saying that
gays can't hack it
in the military?



Are gay service members more like lemmings or more like mice? The Pentagon can't seem to make up its mind. In leaking a report April 6 that showed that the number of discharged gay and lesbian troops has soared 67% since "don't ask, don't tell" was instituted in 1994, officials offered their own explanations. Secretary of Defense William Cohen suggested that gay personnel are willingly committing career suicide by voluntarily outing themselves. "There are some indications that there has been an increase as far as some of the people who have declared themselves to be homosexual and have opted to get out of the military," he said. Other Pentagon officials were less charitable, suggesting in background remarks to reporters that gays "couldn't hack it" in the military.

A simpler explanation, activists suggest, is that the military is on a search-and-destroy mission that violates the intention of the Pentagon's policy. "There's absolutely no support for [the Pentagon's] assertions," said Michelle Benecke, co-executive director of the Servicemembers Legal Defense Network, which counsels personnel targeted for investigation. SLDN's own investigation shows that military commanders routinely disobey regulations, either out of ignorance or deliberately.

In an interview with National Public Radio, Cohen agreed that "some commanders haven't gotten the message" and said he was "very concerned" if the policy was being violated. The Pentagon's report, in turn, does contain some positive recommendations, including a condemnation of antigay harassment,

increased training for commanders, and a requirement that officers consult with superiors before beginning investigations.

The legal challenge to the "don't ask" policy hit a new level April 2, when attorneys presented arguments to the second circuit U.S. court of appeals in the case of *Able v. USA*. Last July a federal district court judge ruled in favor of six service

"There are some indications that there has been an increase as far as some of the people who have declared themselves to be homosexual and have opted to get out of the military."

members who had filed suit, agreeing that the military's policy is unconstitutional.

"The issue in this case is whether the government's argument about privacy and sexual tension being real factors is true or whether our argument that the Constitution does not recognize that as a reason legally [to justify the policy] is true," said Beatrice Dorn, legal director at Lambda Legal Defense and Education Fund. That group, along with the American Civil Liberties Union, is representing the service members. The court is expected to rule within a year. Dorn said the *Able* case is "the wrap-up of the current strategy to challenge the ban" since most other cases have failed. If the service members prove unsuccessful in this case, she said, "we will have to try something completely new" in terms of legal strategies.

—John Gallagher

Scientist won't clone gays ► page 16 k.d. lang catches Tipper Gore's eye ► page 18

April 30, 1998

Rob,

Here is the latest information I have found regarding a possible promotion or 'correction' of McVeigh's record. The cases and regulations cited to are attached in the order they are cited. I am at ext. 65068.

Sean

Regarding promotion to E-9

In most situations, voluntarily retired members will only be retired in the highest grade they satisfactorily held after they have completed the service-in-grade requirements. An instruction from the Secretary of the Navy states that "[n]ondisability voluntary retirement of members serving in pay grades E-7, E-8, or E-9 shall require a minimum of two years active duty in grade unless such members are entitled by law to a higher retired grade upon retirement. . . . [However,] [i]n individual cases involving substantial hardship, unusual circumstances, or when the best interest of the service is concerned, waivers of obligated service in grade may be authorized by the Secretary." Paragraph 11.d. SECNAV Instruction 1811.3M dated 15-November 1989. If McVeigh is promoted to E-9, the Secretary is authorized to waive the normal time requirements for service-in-grade.

Regarding the corrections board and section 1552

I searched through the case law interpreting the power of the Boards of Correction under section 1552 of title 10 of the US Code. Several issues are clear from this case law.

1. Section 1552 "is remedial and to be liberally construed, rather than narrowly or technically." Oleson v. United States, 172 Ct. Cl. 9, 17 (1965). The Court of Claims has also stated that the findings of the Secretary or board of corrections are final and binding upon the Court of Claims and will not be disturbed without a showing by "clear and convincing evidence of arbitrary and capricious action." Armstrong v. United States, 205 Ct. Cl. 754, 760 (1974), and cases cited therein.
2. A court has ruled that the Navy Board of Corrections is not bound to follow, distinguish or overrule its prior equitable decisions, and that it is free to fashion equitable relief on a case-by-case basis. See Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985). The Navy may not be concerned about this, but it should be reassuring to them that whatever they settle on in this case, will not create precedent for future cases.
3. The Secretary of the Navy is given final decision making authority and courts have upheld rejections of the recommendations of the Board of Corrections. The recommendations should be given deference by the Secretary, but so long as the Secretary does not abuse his or her discretion, the Secretary is authorized to accept or reject the Boards recommendations. Miller v. Lehman, 801 F.2d 492 (D.C. Cir. 1986) (upholding Secretary's rejection of Board finding that the informal procedures, rather than a courts-martial, used against a former POW violated Navy tradition); Kolsea v. Lehman, 597 F. Supp. 463 (N.D.N.Y. 1984) (upholding the Secretary's

April 30, 1998

rejection of the Boards recommendation not to force an NROTC student who violated the terms of his scholarship to enroll as an enlisted man upon graduation from college).

While it is clear that Board recommendations forwarded to the Secretary can be accepted or rejected, the current Code of Regulations grants the Board final decision making authority over all cases properly submitted, except in certain enumerated situations. The Board "is authorized to take final corrective action on behalf of the Secretary, unless" the boards recommendation is not unanimous, comments by naval authorities are inconsistent with the Board's recommendation, or it is in the category reserved for decision by the Secretary. See 32 C.F.R. 723.6(e). Among the three categories reserved for decision by the Secretary, the McVeigh decision could fall under the third category which states "[s]uch other petitions as, in the determination of the Office of the Secretary or the Executive Director [of the Board], warrant Secretarial review." 32 C.F.R. 723.6(e)(2)(iii).

4. In cases involving Board and Secretary action under 10 U.S.C. 1552, court opinions and opinions of the Attorney General have upheld board recommendations for:

retroactive promotions (for which member was otherwise entitled),

Caddington v. United States, 147 Ct. Cl. 629 (1960) (holding that plaintiff was entitled to be and would have been promoted under a "terminal leave promotion policy" but for administrative errors and complications associated with his injury and transfers to various hospitals in the Pacific, and is therefore entitled to the promotion and back pay at that rank from the time he should have been promoted); Horn v. Schlesinger, 514 F.2d 549, 552 n.11 (8th Cir, 1975) (holding that the plaintiff failed to exhaust administrative remedies available, and in dicta referring to the Board of Correction's power to review and to correct passover discharges, including corrections resulting in advancement in grade); but see Thornton v. Coffey, 618 F.2d 686, 692 (10th Cir. 1980) (holding that the Board does not have the authority to order a promotion, but can only order an opportunity for promotional consideration based upon an accurate record, payment for losses incurred because of incorrect record, reinstatement and back pay); 41 Op. Atty. Gen. 10 (October 11, 1948) (stating that Board is authorized to recommend a new retroactive promotion for a marine officer, but that the normal promotion procedures, in this case involving nomination by the President with the advice and consent of the Senate, must be utilized to effect the promotion)

changing the date of promotions,

41 Op. Atty. Gen. 71 (January 22, 1951) (stating that the Secretary of the Army is authorized to change the date of an officer's appointment from the actual date of August 1948 to April 1946, but raises concern that Secretary may not have the authority to make a new and retroactive appointment); Darby v. United States, 146 Ct. Cl. 211 (1959) (holding that because the Board changed plaintiff's "dates of rank changes" to correct an error, plaintiff was entitled to additional pay and allowances based on the changed dates),

April 30, 1998

and changing the date of retirement,

41 Op. Atty. Gen. 94 (March 20, 1952) (stating that the Secretary is authorized to change the date of a retiree's retirement from September 1916 to June 2, 1916 in order that he would benefit from a law, enacted after he applied for retirement but before his retirement was ordered, that authorized the promotion of retirees with his qualifications who retired before June 3, 1916).

Secretary may waive service-in-grade
time requirements for retirements in grade E-8 or E-9
in "unusual circumstances"

see pg. 6

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 1811.3M
OP-130C2
15 November 1989

SECNAV INSTRUCTION 1811.3M

From: Secretary of the Navy
To: All Ships and Stations

**Subj: VOLUNTARY RETIREMENT AND
TRANSFER TO THE FLEET
RESERVE OF MEMBERS OF THE
NAVY AND THE MARINE CORPS
SERVING ON ACTIVE DUTY**

Ref: (a) Title 10, United States Code
(NOTAL)
(b) DOD Directive 1332.20 of
20 Feb 83 (NOTAL)
(c) DOD Directive 1315.7 of 9 Jan 87
(NOTAL)
(d) SECNAVINST 1920.6A
(e) SECNAVINST 1910.4A (NOTAL)
(f) SECNAVINST 1420.1
(g) SECNAVINST 5510.30
(h) SECNAVINST 1920.5C
(i) Procedures for the Board of
Correction of Naval Records
(NAVSO P-473)

1. Purpose To establish policy governing voluntary retirement of officers on the active-duty list of the Navy and Marine Corps and voluntary retirement and transfer to the Fleet Reserve or Fleet Marine Corps Reserve of enlisted members of the Navy and the Marine Corps serving on active duty under references (a) through (c).

2. Cancellation. SECNAVINST 1811.3L.

3. Applicability

a. This instruction applies to all Regular and Reserve officers on the active-duty lists of the Navy and Marine Corps and enlisted members on active duty.

b. Voluntary retirement of officers for cause is covered in reference (d). Voluntary retirement and transfer to the Fleet Reserve and Fleet Marine Corps Reserve for misconduct is covered

in reference (e) and service implementing instructions.

4. Policy

a. Department of the Navy policy is to provide for voluntary retirements and voluntary transfers to the fleet reserve components to assist in meeting force management objectives. Those objectives are to maintain a vigorous active force, reasonable promotion flow, reasonable career opportunities in each officer competitive category and in the enlisted career forces. To support these objectives while providing equity and consistency in retirement options for members on active duty, the criteria in this instruction are intended to be applied uniformly to all officer competitive categories and military occupational specialties and enlisted ratings and military occupational specialties, except where otherwise specifically provided.

b. As provided in reference (f), officers (A) may be promoted to the grades of O-4 and above without being required to accept Regular commissions when it is necessary to attain authorized strength in specialties in career grades. A Reserve officer on the active-duty list eligible for retirement under chapter 571 of reference (a) shall be notified that his or her services are no longer required as soon as authorized strength in the grade and specialty of the Reserve officer can be met with a Regular officer. This authority shall not be used to meet the preferences of individual officers.

c. Except as otherwise provided in (R) paragraphs 10e and 10g(3) of this instruction, retirement requests of officers who have not satisfied the minimum active-duty service-in-grade requirements for retirement in the higher grade specified in paragraph 10 will not be approved. Officers who desire to retire prior to completion of the applicable minimum service-in-grade requirement must decline the appointment to the next higher grade. Officers who have accepted appointment to the next higher grade must meet the retired grade

0579-LD-054-7700

determination criteria in paragraph 10. Frocking does not constitute acceptance of a promotion.

d. Except as otherwise permitted in paragraph 11d of this instruction, requests from enlisted members for transfer to the fleet reserve components who have not satisfied the minimum active-duty service-in-grade requirements specified in paragraph 11 will not be approved.

A) e. Requests for voluntary retirement in cases where court-martial charges have been preferred and not disposed of shall be denied except as provided in references (d) and (e).

A) f. The Chief of Naval Personnel (CHNAVPERS) and the Deputy Chief of Staff for Manpower and Reserve Affairs (DC/S (M&RA)) will normally deny, for the Secretary, requests for retirement which do not satisfy the policy and criteria established by this instruction.

R) 5. **Authority to Approve Requests for Voluntary Retirement of Officers Serving in Grades W-1 through O-6.** Final approval of requests for voluntary retirement officers rests with the Secretary, except as delegated to the CHNAVPERS and DC/S (M&RA) in this instruction. The CHNAVPERS and DC/S (M&RA) are hereby delegated authority to approve voluntary retirements of officers in the grades of O-6 and below of the Navy and Marine Corps, respectively. This authority may not be further delegated. The CHNAVPERS and DC/S (M&RA), acting for the Secretary, may approve voluntary retirements as follows:

a. Officers of the Regular Navy or Regular Marine Corps holding a permanent grade of warrant officer (W-1) or above who request retirement after completing 40 years of active service under section 6321 of reference (a).

A) b. Officers of the Regular Navy or Marine Corps holding a permanent grade of warrant officer (W-1) or above who request retirement after completing 30 or more years of active service under section 6322 of reference (a).

c. Officers of the Navy or Marine Corps who request retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, under section 6323 of reference (a).

d. Warrant officers serving in the Navy or Marine Corps who request retirement after completing at least 20 years of active service under section 1293 of reference (a).

e. In acting on requests for voluntary retirement short of 40 years of active service, CHNAVPERS and DC/S (M&RA) will consider the overall needs of the service and the merits of the individual case when the service member has completed a minimum of 20 years of active service as required by chapter 571 of reference (a), and has fulfilled the applicable requirements set forth in paragraphs 8 or 9 of this instruction.

f. CHNAVPERS and DC/S (M&RA) will forward to the Secretary requests for voluntary retirement, with recommendations and supporting rationale, from officers identified by the CHNAVPERS or DC/S (M&RA) as being of limited assignability, or whose continued service is not, due to conditions beyond their control, clearly in the interest of national security consistent with references (d) and (g) and whose requests for voluntary retirement do not meet the requirements set forth in paragraphs 8 or 9.

g. CHNAVPERS and DC/S (M&RA) will forward to the Secretary requests for voluntary retirement, with recommendations and supporting rationale, from officers and enlisted members who have attracted or are likely to attract the attention of the public or media.

6. **Authority to Approve Requests for Voluntary Retirement or Transfer to the Fleet Reserve or Fleet Marine Corps Reserve**

a. Enlisted members of the Regular Navy or Regular Marine Corps who request retirement after completing 30 years or more of active service under section 6326 of reference (a) shall be retired by the CHNAVPERS or DC/S

(M&RA), acting for the President. This retirement authority may not be further delegated. "Enlisted member" includes a member of the Regular Navy or Regular Marine Corps who holds a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade.

b. Final approval of requests for transfer to the Fleet Reserve or the Fleet Marine Corps Reserve and for further transfer to the retired list under this instruction rests with the CHNAV-PERS or DC/S (M&RA).

(1) In approving a request under this instruction, an effective date later than that requested may be specified when, in the best interest of the service, a delay is necessary in order to provide time for orderly relief or completion of the existing or ordered tour of duty.

(2) Unless waived by the Secretary, approval of requests for voluntary retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve will normally be withheld until an individual has completed:

(a) A required period of time at present duty station, as prescribed by the CHNAV PERS or DC/S (M&RA).

(b) A normal tour, prescribed by the CHNAVPERs or DC/S (M&RA) under reference (c).

(3) Unless, in response to service needs, the CHNAVPERs or DC/S (M&RA) direct otherwise, requests for voluntary retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve will not be approved when submitted by individuals subsequent to the date of issuance of orders to report to a new duty station, or actual notification to the individual that such orders will be issued.

(4) Except for separations of officers for cause and release of retirement-eligible Reserve officers as provided in reference (d) and separation of enlisted members for misconduct as

provided in reference (e), requests for voluntary retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve shall not be used to influence unrelated administrative actions.

7. Voluntary Retirement of Flag and General Officers. Flag and general officers will be considered for voluntary retirement on the basis of service needs reflected in the annual promotion and continuation plans approved by the Secretary under reference (f), and the merits of the individual case as required by section 1370 of reference (a).

8. Voluntary Retirement of Officers serving (R in pay grades O-1 through O-6

a. Requests for voluntary retirement will normally be approved for officers serving on active duty in pay grades O-1 through O-6 with at least 20 years active service who fall into at least one of the following categories:

(1) Officers in pay grades O-2 through O-5 who have twice failed of selection for promotion to the next higher grade.

(2) Officers having genuine dependency or undue hardship of a non-temporary nature whose retirement would definitely alleviate the condition under the criteria for such separations in reference (d).

(3) Reserve officers eligible for retirement who have been advised by the CHNAVPERs or DC/S (M&RA) as provided in paragraph 4b that, based on a comparison of inventory to authorized strength in their competitive category and specialty, military occupational specialty, and grade, their continued active service is no longer required.

(4) Officers who have previously served on active duty in a higher grade than that in which presently serving.

(5) Officers in pay grades O-3 through O-6 who have satisfied the applicable service-in-grade requirement of paragraph 10, and any other service obligation incurred.

b. In each case, the retired grade shall be determined under the applicable service-in-grade requirements of paragraph 10.

R) 9. Voluntary Retirement of Warrant Officers.
Requests for voluntary retirement will normally be approved for warrant officers serving on active duty with at least 20 years active service who fall into at least one of the following categories:

a. Warrant officers who have twice failed of selection for promotion to the next higher grade.

b. Warrant officers having genuine dependency or undue hardship of a non-temporary nature whose retirement would definitely alleviate the condition under the criteria for such separations in reference (d).

c. Reserve warrant officers eligible for retirement who have been advised by the CHNAVPERS or DC/S (M&RA) that based on a comparison of inventory to authorizations in their competitive category, designator or military occupational specialty and grade, their continued active service is no longer required.

R) d. Warrant officers in pay grades W-2, W-3, or W-4 who have either served the three-year service obligation for appointment to warrant officer status or two years service-in-grade for promotion and any additional service obligation for educational benefits.

R) 10. Officer Retired Grade Determination.
Unless retirement in the next inferior grade is directed under reference (d), officers retired voluntarily shall be retired in the highest commissioned officer grade satisfactorily held upon completion of the following service-in-grade requirements. The CHNAVPERS or DC/S (M&RA) shall make determinations of satisfactory service, considering the factors noted in paragraph 10j.

R) a. Six months for an officer serving on active duty in, or who has served on active duty in, pay grade O-1 or O-2.

b. Two years for an officer serving on active duty in, or who has served on active duty in, pay grade O-3 or O-4. In individual cases involving hardship or exceptional or unusual circumstances, the approval authority may waive up to eighteen months of the two-year period. (R)

c. Six months for officers notified of their involuntary release from active duty who thereafter request retirement under section 6323 of reference (a). (R)

d. Three years for an officer serving on active duty in pay grade O-5 or O-6. For officers subject to the three-year period, the President may waive any portion, except the minimum period of six months of the three-year period under section 1370 of reference (a), when the President determines that the individual's case involves extreme hardship or exceptional or unusual circumstances. Since only the President may grant such waivers, it is anticipated that very few requests will be considered and approved under this authority. The CHNAVPERS or DC/S (M&RA) shall provide recommendations with supporting rationale to the Secretary. The Secretary shall determine whether a member's request for waiver meets the eligibility criteria, in his opinion, prior to forwarding to the Office of the President. (R)

e. The CHNAVPERS or DC/S (M&RA), shall normally deny retirement requests of officers serving on active duty in, or who have served on active duty in, pay grades O-1 through O-6, whose length of service in the highest grade held while on active duty does not meet the service-in-grade requirements specified above. In cases enumerated in paragraphs 8a(1) through 8a(4) and 10, or when other circumstances clearly indicate that the retention of an officer is not consistent with the needs of the Navy or the Marine Corps, the Secretary, considering the recommendations of the CHNAVPERS or DC/S (M&RA), may authorize an officer who does not meet the applicable service-in-grade requirement to be retired: (R)

(1) In the highest grade in which the officer served on active duty satisfactorily for not less than six months, if in pay grades O-4 or below; or

(2) In the next lower grade in which the officer served on active duty satisfactorily for at least six months, if in the pay grade of O-5 or above.

- R) f. When required to manage grade-structure imbalances which would make a major change in promotion flow point and opportunity, or strength overages such as may occur during a reduction in force, the Secretary may suspend the service-in-grade requirements in paragraphs 10a through 10d for specified competitive categories and specialties or military occupational specialties. The suspension of service-in-grade requirements may be for any combination of grades O-3 through O-6. The CHNAVPERS or DC/S (M&RA) may recommend, with supporting rationale, such suspension in annual promotion plans submitted to the Secretary under reference (f). When service-in-grade requirements are suspended, officers may be retired:

(1) In the highest grade in which he/she served on active duty satisfactorily for not less than six months if in pay grade O-4 or below; or

(2) In the next lower grade in which the officer served on active duty satisfactorily for at least six months, if in the pay grade of O-5 or above.

g. An enlisted member or warrant officer who previously served on active duty in pay grade O-1 or above must satisfy the applicable service-in-grade requirements of this paragraph to be retired in that officer grade (pay grade O-1 or above) unless the officer was temporarily appointed to pay grade O-1 or above in time of war or national emergency, and had his or her appointment terminated as a result of a reduction in force or a similar management action. In the case of an enlisted member or warrant officer:

(1) Who previously served on active duty in pay grade O-1 or above and was reverted to an enlisted or warrant officer grade before 15 September 1981.

(2) Who has not served in pay grade O-1 or above after 14 September 1981.

(3) Whose service-in-grade does not satisfy the applicable service-in-grade requirements of this paragraph, the Secretary, upon recommendation of the CHNAVPERS or DC/S (M&RA), may make a determination to retire such member and advance the member on the retired list to the highest officer grade in which that member satisfactorily served, if that member is entitled to retirement under reference (a).

h. For purposes of this instruction, active-duty service in grade will be computed from the date of rank of such grade.

i. Considering performance in the highest grade held, the length of service in the highest grade held, and the circumstances that resulted in the officer or member no longer being in the highest grade held, CHNAVPERS and DC/S (M&RA) shall make determinations of satisfactory service for enlisted members (the Secretary will make determinations of satisfactory service for officers) eligible for retirement in a higher grade or advancement to a higher grade on the retired list in the following cases:

(1) Officers who served on active duty in a higher officer grade and are eligible for advancement on the retired list under section 6334 of reference (a).

(2) Warrant officers and enlisted members who have served on active duty in a higher officer or enlisted grade and have completed 30 years service and are eligible for advancement on the retired list under section 6334 of reference (a).

(3) Retired warrant officers or enlisted members who have been advanced on the retired list to a higher commissioned grade may request restoration to the former warrant officer or enlisted status within three months after advancement under section 6335 of reference (a).

j. In considering whether an officer or enlisted member served satisfactorily in the current grade held, or in a higher grade, the following factors are considered:

(1) Time served in current or higher grade.

(2) Any report of misconduct, moral or professional dereliction, conduct not in the interest of national security, or conviction by courts-martial.

(3) The nature and severity of any misconduct.

11. Transfer of Enlisted Members to the Fleet Reserve or the Fleet Marine Corps Reserve

a. Requests for transfer to the Fleet Reserve or Fleet Marine Corps Reserve will normally be approved for:

(1) Enlisted members who have completed 20 years of active service, provided they have met active service-in-grade requirements prescribed in paragraph 11d.

R) (2) Limited duty and warrant officers serving under a temporary appointment and having a permanent enlisted grade who have completed 20 years of active service, of which less than 10 years was active commissioned service. Transfer of a temporary officer to the Fleet Reserve or Fleet Marine Corps Reserve will be at the highest enlisted permanent grade held including grades to which advanced while serving concurrently as a temporary officer. Procedures for requesting termination of temporary appointment and transfer to the Fleet Reserve are contained in reference (h).

b. The CHNAVPERS and DC/S (M&RA) will prescribe policy and procedures governing transfer to the Fleet Reserve or the Fleet Marine Corps Reserve to provide the optimal balance among maintaining authorized strength and strengths in ratings and military occupational specialties, a vigorous enlisted force, career incentive, reasonable promotion flow and service in grade, economical use of manpower, and retention of expertise. The CHNAVPERS and DC/S (M&RA), acting for the Secretary, will prescribe service-in-grade requirements and other conditions for transfer to the Fleet Reserve and the Fleet Marine Corps Reserve, consistent with references (b) and (e).

c. The CHNAVPERS and DC/S (M&RA) will prescribe procedures for further transfer from the Fleet Reserve or the Fleet Marine Corps Reserve to the Retired List under section 6331 of reference (a).

d. Nondisability voluntary retirement of (A) members serving in pay grades E-7, E-8, or E-9 shall require a minimum of two years active duty in grade unless such members are entitled by law to a higher retired grade upon retirement. Approval of transfers to the Fleet Reserve or the Fleet Marine Corps Reserve in pay grades E-7 through E-9 shall also require a minimum of two years active duty in such grades. In individual cases involving substantial hardship, unusual circumstances, or when the best interest of the service is concerned, waivers of obligated service in grade may be authorized by the Secretary.

12. **Reconsideration of Retirement Requests.** (A) Requests to withdraw, postpone, or cancel requests to voluntarily retire or transfer to the Fleet Reserve or Fleet Marine Corps Reserve will be considered under the following standards:

a. Requests to change retirement requests submitted before final action has been taken on the original submission may be approved. The date used to determine whether the request to change was submitted before final action was taken on the original request shall be the date on the request to change.

b. Requests to change retirement requests submitted after the original request has been approved but before the member has transferred to the retired list, the Fleet Reserve, or the Fleet Marine Corps Reserve may be approved under the following circumstances:

(1) Changes initiated by the member:

(a) When the member shows compelling circumstances that would substantially benefit the member or his or her dependents.

(b) The member's retention can be accomplished within applicable personnel plans and will be in the overall best interest of the Navy or Marine Corps.

(2) Changes initiated by the Secretary or by the final approval authority for the request: When determined to be in the best interest of the service to not transfer the member on the date established for the member's transfer to the retired list, the Fleet Reserve, or Fleet Marine Corps Reserve.

c. Requests to change retirement requests submitted after the member has been transferred to the retired list, the Fleet Reserve, or Fleet Marine Corps Reserve must be requested through the Board for Correction of Naval Records (see reference (i)).

d. Nothing in this paragraph is intended to limit the Secretary's authority to recall members or to retain members on active duty.

H. LAWRENCE GARRETT, III
Secretary of the Navy

Distribution:

SNDL Parts 1 and 2

MARCORPS Codes H and I

Commander
Naval Data Automation Command
(Code 813)
Washington Navy Yard
Washington, DC 20374-1662 (280 copies)

Stocked:
CO, NAVPUBFORMCEN
5801 Tabor Avenue
Philadelphia, PA 19120-5099 (500 copies)

§ 1552 is remedial, construe it liberally

see pg. 17

172 Ct. Cl. 9 printed in FULL format.

FLORENCE W. OLESON, SURVIVING SPOUSE AND BENEFICIARY OF
VICTOR L. OLESON, DECEASED v. THE UNITED STATES

No. 376-64

UNITED STATES COURT OF CLAIMS

172 Ct. Cl. 9; 1965 U.S. Ct. Cl. LEXIS 136

July 16, 1965, Decided

SUBSEQUENT HISTORY: [**1]

Defendant's Motion for Rehearing Denied October 15, 1965.

SYLLABUS: ON DEFENDANT'S MOTION TO DISMISS THE PETITION

Military pay; retired pay; limitation of actions; Correction Board action. -- Plaintiff, who served as an officer in World War I, was thereafter retired, recalled to active duty in World War II and, after the passage of the Pay Readjustment Act of 1942 (56 Stat. 359, 367-68), re-retired, obtained a correction of his military records to show that not only his active service but also his inactive service or time on the retired list should be included in the computation of his retired pay pursuant to paragraph 4, section 15 of the Pay Readjustment Act of 1942. Despite the ruling of the General Accounting Office that the Board was without authority to make an award where the hard facts of a record were not changed, payment was ordered and made by the Army. Thereafter, on the insistence of the Comptroller General, the amount paid was recouped by monthly withholdings from plaintiff's retired pay. It is for the amount of such withholdings that plaintiff sues. It is held the Correction Board legislation authorizes not only the correcting of so-called hard facts in a [**2] military or naval record, but also the correction of erroneous legal conclusions based on otherwise correct facts; that the Board is also authorized to order, and the department involved is authorized to make, payment of any amounts due as the result of the correction of the legal mistake in the military or naval record, and a later recoupment of such payment gives rise to a new cause of action which may be sued on within six years of the date of such recoupment. *Haislip v. United States*, 152 Ct. Cl. 339, 296 F. 2d 469 (1961), distinguished. Defendant's motion to dismiss is denied and the case is returned to the trial commissioner for further proceedings.

Military pay; limitation of actions; accrual of cause of action; withholding or deduction of pay; generally. -- A claim for pay improperly withheld or deducted accrues at the times of such withholdings or at the latest, at the time such withholding is complete.

Military pay; limitation of actions; accrual of cause of action; Correction Board, mistake of law correction; payment recouped. -- Where the Correction Board corrects a military record insofar as it contains an erroneous legal conclusion, and payment [**3] of amounts due as a result thereof is ordered by the Board and actually made to the serviceman, the later improper recoupment of such payment creates a new cause of action which may be sued on in the Court of Claims if the petition is filed within six years of the date of such improper recoupment. If there has been only a correction of the legal conclusion in

the record and no payment and recoupment, then the cause of action accrued when payments were not properly made under the uncorrected record and the later correction without payment did not give rise to a new cause of action. *Haislip v. United States*, 152 Ct. Cl. 339, 296 F. 2d 469 (1961).

Military pay; correction of military or naval records; what constitutes correction. -- The Act of August 2, 1946, 60 Stat. 812, 837, as amended, 10 U.S.C. @ 1552, authorizes the Secretary of each armed service, acting through a civilian board, to correct any military record where he considers such action necessary to correct an error or remove an injustice, and it also authorizes the department concerned to pay any amounts found due as a result of such correction. This authority to correct a military record is not confined [**4] to the correction of so-called facts in the record but contemplates correction of any military record including the service's erroneous legal conclusions reached on the basis of facts which themselves do not require any alteration. When the Correction Board changes parts of a military record which incorporate administrative conclusions as to the legal effect of facts in the record, the record is corrected. Thus where a service record correctly reflects a man's 21 years of active service and 6 years of inactive service on the retired list, but incorrectly shows his entitlement to retired pay based on only the 21 years of active service, the Correction Board and the Secretary are authorized to change the legal conclusion in the record regarding the man's creditable service for pay purposes.

Military pay; correction of military or naval records; authority of Correction Boards; generally. -- Under section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended, 65 Stat. 655, the various military service Secretaries acting through civilian correction boards, may correct not only facts, but also erroneous legal conclusions embodied in military or naval [**5] records and pay the claimant whatever is due as the result of such correction.

Statutes; construction and operation; remedial legislation. -- Remedial legislation should be liberally construed rather than narrowly or technically. The legislation creating the Boards for Correction of Military Records (Act of August 2, 1946, 60 Stat. 812, 837, as amended, 10 U.S.C. @ 1552) is remedial legislation giving the boards authority to correct errors and injustices in the records of service personnel. The history of the act and its remedial nature impels the conclusion that the boards were authorized to correct not only factual but legal mistakes in military records.

Military pay; correction of military or naval records; authority of Board to award back pay. -- Under the 1951 amendment to the Legislative Reorganization Act of 1946, 65 Stat. 655, the service departments concerned were given authority to pay whatever was shown to be due as the result of the correction of a military or naval record whether the correction involved a change in the facts of the military record or merely a change in the legal conclusions embodied in the military or naval records.

COUNSEL: Harry E. Wood [**6] , attorney of record, for plaintiff.

Arthur E. Fay, with whom was Assistant Attorney General John W. Douglas, for defendant.

JUDGES: Cowen, Chief Judge, Laramore, Durfee, Davis and Collins, Judges. Davis, Judge, delivered the opinion of the court.

OPINIONBY: DAVIS

OPINION: [*12] In Gordon v. United States, 134 Ct. Cl. 840, 140 F. Supp. 263 (1956), this court ruled that, under the Pay Readjustment Act of 1942, 56 Stat. 359, 367-68, military officers who served before the end of hostilities in World War I, who were thereafter retired and recalled to active duty, and who were then "re-retired" after the passage of the Pay Readjustment Act were entitled to count, in computing their retired pay under that statute, the years they had spent on the retired list. See, also, Danielson v. United States, 121 Ct. Cl. 533, 102 F. Supp. 575 (1952); Carroll v. United States, 117 Ct. Cl. 53, 81 F. Supp. 268 (1948); Sherfey v. United States, 141 Ct. Cl. 307, 157 F. Supp. 936 (1958), and Field v. United States, 141 Ct. Cl. 312, 158 F. Supp. 580 (1958), cert. denied in both, 357 U.S. 926.

According to the petition, the present plaintiff's decedent [**7] (together with a number of other officers) was in the same category as Major Gordon. When Captain Oleson was re-retired he was serving in that grade and receiving the basic active duty pay of such an officer with over 27 years of service. Thereafter, he was paid, under the 1942 Pay Readjustment Act, at the rate of 75 per cent of the active duty pay of an Army captain with over 21 years of service, rather than a captain with over 27 years' service; his years on the retired list after his first retirement (in 1934) and before his recall to active duty (in 1941) were omitted for retirement pay purposes. After Gordon, he filed a claim in August 1958 with the General Accounting Office for the additional retirement pay. That agency paid the claim, under its ten-year statute of limitations (31 U.S.C. @ 71a), back to August 1948. n1 The decedent then applied to the Army Board for the Correction of Military Records to correct his records to show his entitlement to retired pay on the basis of 27 (instead of 21) years of service, for the period from February 23, 1943 (when he was re-retired) to August 28, 1948 (the starting point of the General Accounting Office's award).

- - - - -Footnotes- - - - -

n1 Captain Oleson also filed a petition in this court which was dismissed by stipulation, on January 6, 1959, after the General Accounting Office had made its award. That petition in this court covered only the period after 1952.

After the General Accounting Office's decision, Captain Oleson continued to be paid at the higher rate.

- - - - -End Footnotes- - - - -

[**8]

[*13] In March 1959, the Assistant Secretary of the Army approved the Correction Board's action in decedent's favor and directed:

1. That all of the Department of the Army records of VICTOR L. OLESON be corrected to show:

a. that as of 24 February 1943 he was credited for longevity pay purposes with over 27 years of service as computed under the Pay Readjustment Act of

1942 (Public Law 607, 77th Congress); and

b. that the Department of the Army pay to VICTOR L. OLESON or other proper person, or persons, all money found to be due as a result of the foregoing correction of military records.

These corrections were made and the Army Finance Department was directed to pay Captain Oleson. Before that was done, the General Accounting Office ruled (Decision B-137384, Sept. 11, 1959, 39 Comp. Gen. 178) that payment was unauthorized because the Correction Board was without power to make an award which did not change the facts of the serviceman's record. Captain Oleson then returned to the Correction Board for reconsideration. In April 1960, the Assistant Secretary modified his earlier action to direct:

1. That all of the Department of the Army records, including [**9] all military pay records, of VICTOR L. OLESON be corrected wherever appropriate, to show that he was re-retired on 24 February 1943, at which time he was credited for longevity pay purposes, in the computation under the Pay Readjustment Act of 1942 of his service for retired pay, with over twenty-seven years' service.

2. That the Department of the Army pay to VICTOR L. OLESON or other proper person, or persons, all money found to be due as a result of the foregoing correction of military records.

The Army thereupon paid decedent, in July 1960, the sum of \$ 1,288.44, which was the difference in his retired pay (from February 23, 1943 to August 28, 1948) due under the Secretary's directive.

Later, the Comptroller General held (Decision B-143582, August 10, 1960), with relation to another claimant in the same class, that the Correction Board had no authority to make its determination in favor of Captain Oleson, and he [*14] was asked by the Army to refund the \$ 1,288.44 in full. On his refusal, the amount of \$ 70 per month was withheld from his retired pay beginning January 1, 1961; with some suspensions, the total sum was recouped as of October 31, 1964. This suit was [**10] begun on November 6, 1964, by plaintiff, as Captain Oleson's surviving spouse and beneficiary, to recover the \$ 1,288.44.

Defendant moves to dismiss the petition as barred by our six-year limitations statute and as failing to state a claim upon which relief may be granted. There is no dispute that, under *Gordon v. United States*, supra, Captain Oleson's retired pay should have been computed at the higher level from the time he returned to the retired list in February 1943. The Government's position is, rather, that this court cannot now grant judgment for that pay and that the Correction Board could not do so either.

The limitations defense is plainly unavailable. Plaintiff's claim in this court arose no earlier than the dates on which the Army withheld money from her husband's retired pay, beginning in January 1961, and indeed may not have accrued at all until the withholding was complete on October 31, 1964. This judicial claim is that \$ 1,288.44 was improperly deducted from the decedent's retired pay during that period, or, to put it otherwise, that because of the deductions the decedent was not paid the full amount of retired pay to which he was duly entitled from [**11] January 1961 to October 1964. The suit was brought well within six years of both of those dates and is therefore timely. See, e.g., *Baggett Transp. Co. v. United States*, 162 Ct. Cl. 570, 573, 582,

319 F. 2d 864 (1963); The Baltimore & Ohio R.R. v. United States, 141 Ct. Cl. 128, 132, 158 F. Supp. 862, 864 (1958).

This brings us to Haislip v. United States, 152 Ct. Cl. 339, 296 F. 2d 469 (1961). The four plaintiffs in that combined case were in the same situation as Captain Oleson -- with one significant difference. The similarities are that they were all entitled, under the Gordon rule, to have their retirement pay recomputed with credit for their years on the retired list; the General Accounting Office had also given them this increased retirement pay back ten years, but no further; and the Correction Board had held them entitled to the increased [*15] pay for all periods subsequent to their re-retirement (after the Pay Readjustment Act of 1942). The great difference is that the services had not actually paid those plaintiffs for the earlier period (i.e., prior to the time covered by the GAO's ten-year award of back pay) because the GAO had [*12] ruled (with respect to Captain Oleson) that the Correction Board was powerless to grant entitlement to this additional compensation. The Correction Board's determination that those plaintiffs should be paid had therefore never been carried into effect. They never received the additional sums due under the Gordon rule. Unlike the present claimant, those plaintiffs did not sue for monies withheld from them during the six years before suit; instead, they asked in 1959 for retired pay which they should have had during the 1940's and which they had never had. In the eyes of the law, their claim was either based directly on the retirement legislation which the court had interpreted in Gordon (i.e., the Pay Readjustment Act of 1942) or directly upon the unexecuted findings by the Correction Board that they were entitled to the extra money.

The Government raised the six-year statute of limitations, 28 U.S.C. @ 2501, and the majority of the court agreed with that defense. The opinion held that, insofar as the claims were based directly on the substantive retirement legislation, they obviously arose in the 1940's when the defendant failed to pay the full amount of retirement [*13] pay owing the plaintiffs -- much more than six years before the actions were commenced in this court. As for the claims founded on the Correction Board's unimplemented action, the court thought that the Board's "decision" did not give the plaintiffs any new judicial right they "had not had all along", since no fact appearing in their military records was changed. The plaintiffs, the opinion said, could have filed suit as soon as the correct retirement pay was denied them in the 1940's. "The Board's decision was merely a legal conclusion, based on the law and the facts of record, no one of which was changed by the Board." 152 Ct. Cl. at 343, 296 F. 2d at 471. In those circumstances, the court thought that to give the plaintiffs a judgment "would be in the face of the statute of limitations [*16] of six years on suits in this court." 152 Ct. Cl. at 344, 296 F. 2d at 471.

Haislip, as the majority opinion clearly shows, was grounded squarely on this six-year limitations statute. The court was dealing with a claim which could have been brought directly to this court, and in which no intervention by the Correction Board was needed as a prerequisite to suit. The court also [*14] had before it plaintiffs who had never received the pay to which they were entitled, either directly or through a Correction Board proceeding. In such a case, the court held, the Board's "determination" or "decision" in favor of the claimant -- left unimplemented by actual payment -- fell short of creating a new cause of action avoiding the six-year bar. After the time-bar had fallen on the original claim, this court could not implement the Board's unexecuted holding. See, also, Friedman v. United States, 159 Ct. Cl. 1, 6-8, 23-24 (esp. fn. 20), 310 F. 2d 381, 384-85, 395 (1962), cert. denied, 373 U.S. 932 (1963); Morris

v. United States, 163 Ct. Cl. 259 (1963), same case on the proofs, 171 Ct. Cl. 220 (1965). n2 But the Haislip opinion did not hold or suggest that a payment by the service itself to the claimant, in execution of the Board's determination, would be illegal or improper. The court was at pains to leave that issue completely open: "Whether the Correction Board had or had not authority to pay plaintiff, we have not." 152 Ct. Cl. at 344, 296 F. 2d at 471.

- - - - -Footnotes- - - - -

n2 On the other hand, where Correction Board action is a necessary prerequisite to judicial consideration of the claim, the court has ruled that the Board's determination does give rise to the cause of action on which suit is brought. See, e.g., Friedman v. United States, supra, 159 Ct. Cl. at 8 ff., 310 F. 2d at 385 ff.; Schiffman v. United States, 162 Ct. Cl. 646, 319 F. 2d 886 (1963), Cf. Barnes v. United States, 163 Ct. Cl. 321 (1963); Lerner v. United States, 168 Ct. Cl. 247 (1964).

- - - - -End Footnotes- - - - -

[**15]

That is the precise question we now have before us -- whether the payment to plaintiff's decedent, as a result of the Correction Board action, was unauthorized, illegal, or improper. If so, the Army's subsequent withholding of the \$ 1,288.44 was correct; if not, the Army had no right to deduct that amount from the retired pay to which the decedent was entitled during the period from January 1, 1961, to October 31, 1964.

Despite the position of the Comptroller General, we see no [*17] adequate reason why the Correction Board could not direct that this payment be made to Captain Oleson. The Board's charter (the Act of August 2, 1946, 60 Stat. 812, 837, as amended, 10 U.S.C. @ 1552) authorizes the Secretary, acting through a civilian board, to "correct any military record of that department when he considers it necessary to correct an error or remove an injustice", and provides that the department may pay "a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's [*16] service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be." The Comptroller General felt that the Board's power was merely to correct, change, or supplement facts set out in the original record, but the statute refers, not to alteration of the facts in the record, but to a correction of "any military record" itself. A record which shows, erroneously, that an officer is credited, for retirement purposes, with only 21 years of service is inaccurate and can be corrected to show entitlement to 27 years, even though there is no change in any bare fact of the serviceman's military career. Records often embody and reflect legal conclusions, or the application of legal views to bare facts, and it is proper to say that such records are corrected when the Board changes those parts of the record which incorporate the administrative conclusions as to the legal effect of the facts. In Captain Oleson's case, for instance, the Army records, including military pay records, showed, before the Board acted, that he was to be paid his retired pay on the basis of 21 years of service, and they also failed to say that he was re-retired in February 1943. Those records, [*17] including the pay records, were then corrected (as a result of the approval of the Board's action) to show that he was re-retired in February 1943 and that he was credited, at that time,

with over 27 years' service in the computation of his retired pay. The hard facts remained as before but the Army's conclusions from those facts, as embodied in its records, were materially altered.

We cannot consider that change as anything other than a correction in military records under 10 U.S.C. @ 1552. The [*18] broad terms of the statute cover it. The legislation is remedial and to be liberally construed, rather than narrowly or technically. 40 Ops. Atty. Gen. 504, 508 (1947); 41 Ops. Atty. Gen. 203, 206, 208 (1954). Nothing in the legislative history forbids this result. On the contrary, that history tends to aid the conclusion that the Board can correct military records insofar as they comprise or mirror erroneous or mistaken legal views, although there is no change in the hard facts themselves. "[It] is clear that the Correction Boards were initially authorized in 1946 to provide an administrative substitute for the enactment of private bills for the correction of military or **18] naval records." Friedman v. United States, supra, 159 Ct. Cl. at 38, 310 F. 2d at 404; Ogden v. Zuckert, 298 F. 2d 312, 314-15 (C.A.D.C., 1961); 40 Ops. Atty. Gen. 504 (1947); 41 Ops. Atty. Gen. 12, 14 (1949); 41 Ops. Atty. Gen. 71, 73 (1951); 41 Ops. Atty. Gen. 203, 206-07 (1954). It would seem to follow that the Boards were given jurisdiction to change the legal conclusions imbedded in military records just as Congress could do, and had done, by private act. n3

- - - - -Footnotes- - - - -

n3 In addition, the legislative background of the 1951 amendments, expressly empowering the services to make payments on the basis of Board determinations, suggests that the Boards were not expected to adopt a technical or narrow conception of their jurisdiction. See the legislative materials referred to in Friedman v. United States, 141 Ct. Cl. 239, 257, 158 F. Supp. 364, 375 (1958), and Haislip v. United States, supra, 152 Ct. Cl. at 349-51, 296 F. 2d at 474-75 (dissenting opinion).

- - - - -End Footnotes- - - - -

We conclude that the Correction [*19] Board and the Secretary acted within their statutory authority in changing and correcting Captain Oleson's records. When he was paid as a consequence of the Board's determination, that payment was wholly lawful and proper under the specific statutory provision (added in 1951) authorizing the services to make payments due as a result of a correction in records (section 1552 (c)). Under the statute, too, that determination and the payment, lawfully made, were "final and conclusive on all officers of the United States", including the General Accounting Office (section 1552(a)).

This means, it is true, that, in cases in which the Correction Boards merely correct legal conclusions embodied in military records and payment is then made to the claimant, the Boards will afford a second forum, alternative or additional [*19] to the courts, for relief of what would otherwise be conventional judicial claims. The sweeping words of the statute permit that result, as does the Congressional purpose to enable the military departments, through these boards, to grant relief for errors and injustices of many and varied kinds. So long as the records contain a mistake or an omission bearing on **20] pay -- whether factual or legal -- we think that the Boards have authority to consider the matter and then to order payment if they make a correction calling for a monetary award.

To some it may be anomalous to hold that an officer who was paid as a result of a Board determination (like Captain Oleson) can sue to recover the monies thereafter deducted, erroneously, to make up for that payment, while officers with the same kind of claim who received similar Board rulings but were never paid (e.g., Captain Haislip) are held barred by limitations. We see a meaningful distinction between the two groups, centering on the fact of payment in the one instance and the refusal to pay in the other. These claims are all of the monetary class which could be brought to this court without prior Board consideration, and for which the Board is merely an alternative or additional forum. If the claim is of this type, a Board "determination" which has not been implemented by payment is inchoate, not final or binding; without payment, a Board's "decision" of a pecuniary claim of this type is left hanging in the air since the goal of a monetary claim is payment. There being no final resolution [**21] of the monetary demand, Haislip considered that the Board's determination had no operative effect upon the court's jurisdiction or processes: the court had to deal with the controversy as if there had been no administrative consideration, and had to apply its own rules of jurisdiction and limitations. The Haislip majority felt that to accept the mere unimplemented "decision" of the Board would thwart the judicial statute of limitations Congress had established for this court. See, also, *Morris v. United States*, supra. Where payment is made, however, and is then recouped -- as in this instance -- the case no longer involves the original claim but the validity of the executed payment. As pointed out earlier in this opinion, there is no problem of a time-bar [*20] since the recoupment occurred within the six years prior to suit. There is no thwarting of the Congressional limitation on our jurisdiction, and without erosion of that restriction we can accept the administrative payment of the claim as a final and valid act of the Army, within its jurisdiction and competence. n4

- - - - -Footnotes- - - - -

n4 Like the GAO, with its ten-year limitations period (31 U.S.C. @ 71a), the Correction Boards have their own limitations period, separate from this court's six-year statute. See 10 U.S.C. @ 1552(b). There is no question that Captain Oleson filed a timely claim with the Board.

- - - - -End Footnotes- - - - -

[**22]

Comparable distinctions based on the fact of payment are not unknown to the law applied by this court. For instance, in the field of freight transportation, the Government has customarily paid the bills submitted by the carriers and then recouped any asserted overcharges by deductions from later (and unrelated) payments. If a carrier, which was first paid and then suffered a deduction, brought a timely suit to recover the recoupment, there would be no limitations problem even though the shipment which was the subject of the deduction was itself an old one. See *Baggett Transp. Co. v. United States*, supra; *Baltimore & Ohio R.R. v. United States*, supra. On the other hand, if the Government happened to fail to pay another carrier with the same kind of a claim (i.e., on the same type of shipment, at the same time, under the same tariff), that second carrier would be barred unless it filed a suit within the prescribed period from the accrual of the original claim; if the second carrier waited until the first company sued, it would find itself far out of time. As here, the combination of payment plus recoupment makes the difference.

The grounds of defendant's motion [**23] to dismiss are not well taken. The petition states a proper claim and is not barred by limitations. The motion is denied and the case is returned to the trial commissioner for further proceedings.

In accordance with the decision of the court that plaintiff would be entitled to recover the sum of \$ 1,288.44, to which defendant has agreed, it was ordered on February 23, 1966, that plaintiff's motion for summary judgment be granted and that judgment be entered for plaintiff for \$ 1,288.44.

need for

Clear + convincing evidence
of erroneous, arbitrary + capricious
action

see 79 760

205 Ct. Cl. 754 printed in FULL format.

JAMES A. ARMSTRONG v. THE UNITED STATES

No. 734-71

UNITED STATES COURT OF CLAIMS

205 Ct. Cl. 754; 1974 U.S. Ct. Cl. LEXIS 31

December 18, 1974, Decided

SYLLABUS: [**1]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; correction of military records; discharge after second passover for promotion. -- Plaintiff, a former Captain with a Reserve Commission in the Air Force with approximately 12 years' service and who was twice passed over for promotion to Major, seeks to have his honorable discharge voided, pay and allowances from the date of his discharge, June 30, 1968, to date of judgment, military hazardous duty and flight pay from the date of removal from flight duty, and promotion to Major effective retroactively to the date of his first nonselection. While plaintiff's Officer Effectiveness Reports (OER) generally showed him to be an above-average navigator, he had behavioral problems, and on several occasions was charged with drunk and disorderly conduct, plaintiff electing nonjudicial punishment under 10 U.S.C. @ 815, Article 15, in lieu of court-martial proceedings. Following a psychiatric report, AFR 36-2 discharge action was contemplated, but this was postponed and plaintiff was grounded for medical reasons and suspended from flight duty. For a little over a year plaintiff received favorable OER ratings, [**2] and then again was charged with drunk and disorderly conduct and elected Article 15 punishment. In the same year (1966) AFR 36-2 proceedings were instituted but it was concluded that the record was insufficient to support all the charges. Also in 1966 the Air Force Selection Board passed over plaintiff for promotion to Major. In November 1967 plaintiff elected Article 15 punishment for drunk and disorderly conduct. Having again been considered by the Selection Board for promotion to Major and passed over, plaintiff received an honorable discharge. On plaintiff's appeal, the Air Force Board for Correction of Military Records did not find probable error or injustice, but would consider additional information that had not been supplied; in the absence of such information the Board declined to take further action and afford plaintiff a hearing. Plaintiff contends that his entire career was thwarted due to racial prejudice, that the first AFR 36-2 discharge proceeding was placed before the first Selection Board and that this knowledge prevented plaintiff from being promoted, that the correction board erred in failing to recognize this injustice and solicited advisory opinions adverse [**3] to plaintiff which the latter was not permitted to refute at a hearing. It is held that plaintiff has failed to meet his burden of producing cogent and clearly convincing evidence to warrant substitution by this court of its judgment for that of the military reviewing authorities, and has failed to prove that the authorities' decision was arbitrary, capricious or erroneous in law; that since a mere reference to the discharge proceeding was before the Selection Board, not the actual proceedings, and since no Air Force regulation was violated, the correction board was not arbitrary or capricious in failing to find error; that the correction board was not arbitrary or capricious in seeking advisory opinions regarding plaintiff; and that plaintiff is not entitled to

recover. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Military pay; correction of military records; decision of Board; finality of decision.

The findings of the Secretary of the military service or a board for correction of military records respecting the discharge of a military person are final and binding upon this court unless it is shown [**4] by clear and convincing evidence that such findings were arbitrary and capricious, not supported by substantial evidence or erroneous in law.

Military pay; regulation of Executive Department; necessity for compliance with.

The Secretary of the Air Force is bound by the Service's own regulations.

Military pay; promotions; Air Force regulations; Selection Boards.

Absent a regulation stating or implying the contrary, AFR 36-89, para. 23, subpara. d, can reasonably be interpreted as allowing negative information of a serious nature that could impair a promotion candidate's functioning as an officer, such as the circumstances precipitating an AFR 36-2 proceeding, to be before the Selection Board.

Military pay; presumptions; official actions, regularity of.

Presumption favors the validity of official military acts and, absent contrary evidence, it is presumed that the military correction boards and the military personnel whom it is the board's function to correct, performed their functions properly, considering all pertinent records relating to the subject military person.

Military pay; courts and boards; Selection Board; record before Board.

In considering [**5] a candidate's qualifications for promotion, a mere reference before the Air Force Selection Board to discharge proceedings under AFR 36-2, and not the actual proceeding, cannot be the basis for concluding that the Board for Correction of Military Records on plaintiff's appeal of his discharge following his second non-selection for promotion was arbitrary or capricious when it determined that the record failed to establish probable error or injustice particularly where no Air Force regulation was violated.

Military pay; discharge; fitness for military service; discretion of military.

It is for the military to decide who is and who is not fit for service.

Military pay; promotions; generally.

The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon such promotion procedure. *Brenner v. United States*, 202 Ct. Cl.

678 (1973), cert. denied, 419 U.S. 831. (1974).

Military pay; correction of military [**6] records; authority of correction boards; advisory opinions, use of.

The Board for Correction of Military Records in its investigatory functions may seek advisory opinions in evaluating an applicant's record of fitness for service, and a hearing is not required on these matters since the Board's function does not involve conducting adversary proceedings.

Military pay; correction of military records; hearing before correction board; right to hearing.

10 U.S.C. @ 1552 and the implementing regulations do not require that an applicant for correction of his military records be given a hearing, the matter being left to the board's discretion. This court will not hold the denial of a hearing improper where the applicant has failed to show, based on the documentation supporting the application, that the board acted arbitrarily in denying the hearing.

COUNSEL: Scott Daniel, attorney of record, for plaintiff.

Frank H. Clabaugh, with whom was Assistant Attorney General Carla A. Hills, for defendant.

JUDGES: Laramore, Senior Judge, Skelton and Kunzig, Judges. Laramore, Senior Judge, delivered the opinion of the court.

OPINIONBY: LARAMORE

OPINION: [*757] This is a [**7] military pay case in which plaintiff, a former Captain with a Reserve commission in the U.S. Air Force and approximately 12 years of military service at the time of his discharge on June 30, 1968, sues for a judgment voiding the honorable military discharge after being passed over twice for promotion to the grade of Major; for all pay and allowances due him as a Captain in the U.S. Air Force from date of discharge to date of judgment; for military hazardous duty and flight pay from the date plaintiff was removed from flight duty, October 2, 1964 to date of judgment; and for promotion to the grade of Major effective retroactively to October 6, 1967, the date of the second selection panel.

This case turns primarily on its facts, which will be set forth here only to the extent necessary for this decision.

Plaintiff's Officer Effectiveness Reports (OER) generally showed him to be an above-average navigator, but a person with behavioral problems. On June 14, 1964, plaintiff failed to report for duty at his aircraft due to drunkenness and subsequently accepted disciplinary action in the form of Article 15, non-judicial punishment. n1 In July of 1964 plaintiff underwent a routine medical [**8] examination in which he was found unqualified for flight duty due to an ulcer which existed since [*758] at least 1961. The Surgeon General granted him a waiver. During the course of this examination plaintiff sought psychiatric help. The psychiatrist found plaintiff was suffering from "situational maladjustment, chronic, moderate, acute, severe, manifested by marital discord, impulsive aggressive behavior, symptomatic over-indulgence in

alcohol and by impaired judgment and insight." The medical conclusion was one of minimal impairment with administrative separation recommended only if it became apparent that plaintiff was dealing inadequately with his problems. Base flight surgeons analyzed the report and recommended plaintiff be continued in flight status but be kept under assiduous observation.

- - - - -Footnotes- - - - -

n1 10 U.S.C. @ 815, Art. 15, Commanding officer's non-judicial punishment. Under this provision plaintiff had the alternative of choosing a court-martial, declaring his innocence and fighting the charge.

- - - - -End Footnotes- - - - -

[**9]

The Wing Commander, contemplating an Air Force Regulation (AFR 36-2 "Administrative Discharge Procedures"), n2 called for a complete review of plaintiff's record. During this meeting information developed on two unfavorable incidents which occurred prior to that of June 1964. Results of this meeting culminated in plaintiff's being grounded for medical reasons, suspension from flight duty and postponement of the discharge proceeding. The Colonel responsible for this decision personally notified plaintiff of the actions and the reasons for it. Plaintiff responded with a letter of complaint to his U.S. Senator alleging racial discrimination. The Senator's inquiry initiated an investigation, conducted by Air Force personnel, that revealed no racially biased motives on the part of plaintiff's immediate colleagues and superiors.

- - - - -Footnotes- - - - -

n2 AFR 36-2 establishes criteria for identifying active-duty Air Force officers who, due to evidence of unfitness or unacceptable conduct, should be required to show cause for retention in the Air Force. The following sub-items of paragraph 4(a) of the regulation enumerate the conduct relevant to this case: (4) excessive use of alcoholic beverages and (6) an officer's recurrent misconduct that raises serious doubts concerning his fitness for retention in the Air Force regardless of whether such misconduct has or has not resulted in judicial or non-judicial punishment.

- - - - -End Footnotes- - - - -

[**10]

After removal from flight duty plaintiff was assigned for approximately five months (January 1, 1965 -- May 31, 1965) as Crew Training Flight Administrative Officer and approximately 11 months (June 1, 1965 -- May 5, 1966) as Chief of the Personnel Services Section at Stewart Air Force Base, Tennessee. In both positions plaintiff received very favorable OER ratings.

[*759] On June 29, 1966 plaintiff was reported drunk and disorderly in the Officers' Club and operated a motor vehicle while intoxicated. Plaintiff again elected Article 15, nonjudicial punishment, in lieu of a court-martial.

On August 18, 1966 proceedings were instituted, under AFR 36-2, based on plaintiff's continued unsatisfactory performance.

On October 17, 1966 the Air Force Selection Board passed over plaintiff for promotion to the grade of Major while selecting approximately two-thirds of the eligible officers. The record does not indicate that improper material concerning plaintiff was before the Selection Board.

On March 28, 1967, the AFR 36-2 proceedings culminated in a recommendation that plaintiff should be honorably discharged. On August 25, 1967 the Judge Advocate General, on review of the AFR [**11] 36-2 proceedings, concluded that the record was insufficient to support all the charges and advised against an administrative discharge, which the Air Force accepted.

The OER (for the one-year period ending May 1, 1967) showed plaintiff did an above-average job as Chief of the Personnel Services Branch at Stewart Air Force Base but continued to have drinking problems that impaired his minimum standards of conduct as an officer. Plaintiff answered the negative OER statements without providing evidentiary support for his comments.

On November 2, 1967 plaintiff was again offered a choice between court-martial and Article 15 punishment n3 for drunk and disorderly conduct that occurred at the Officers' Club on September 29, 1967. Plaintiff chose the Article 15 punishment and alleged that conduct such as his was not uncommon at the Officers' Club. Inquiry proved this statement to be without merit. On October 6, 1967 plaintiff was considered a second time by the Selection Board for promotion to temporary grade of Major. He was again passed over and consequently received an honorable discharge on June 30, 1968.

- - - - -Footnotes- - - - -

n3 Note 1, supra.

- - - - -End Footnotes- - - - -

[**12]

In May 1968 plaintiff appealed his case to the Air Force [*760] Board for Correction of Military Records (hereinafter referred to as BCMR) setting forth allegations similar to those addressed to this court. After consideration of plaintiff's record, including solicitation of "advisory" statements from persons involved with plaintiff during his Air Force career, the BCMR notified plaintiff that it had carefully considered his record with the presented facts and did not find probable error or injustice. The BCMR left itself open to consider additional information that has not been supplied. In the absence of the presentation of any such information, the BCMR would not take further action and afford plaintiff a hearing.

Plaintiff contends his entire career was thwarted due to racial prejudice. Derogatory information, motivated by racial bigotry, in the form of the first AFR 36-2 discharge proceeding, was placed before the first Selection Board. Allegedly, the Board's knowledge of this proposed discharge action prevented plaintiff from being promoted before his first Selection Board. This "stigma" of being "passed over" the first time, and having one's file so marked, is sufficient [**13] to preclude selection by the second Selection Board.

The plaintiff further alleges that the BCMR erred in failing to recognize this injustice and compounded the mistake by soliciting advisory opinions, adverse to plaintiff, which plaintiff has not been permitted to refute at a

hearing. It is alleged that the failure to provide confrontation on the adverse advisory opinions constitutes a violation of administrative due process. Except for the file notation "passed over" and the allegation that this label thwarts future promotion, plaintiff does not dispute the procedures before the second Selection Board. Plaintiff's ultimate contention, and the primary issue in this case, is that the BCMR acted arbitrarily and capriciously in failing to grant him a hearing on the alleged errors and correct his record to accord with the relief sought in this court.

The basis for this law suit is the act establishing boards for the correction of military records, n4 and it provides in pertinent part, as follows:

[*761] @ 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary [**14] of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

- - - - -Footnotes- - - - -

n4 Section 207 of the Act of August 2, 1946, 60 Stat. 812, 837, as amended, 65 Stat. 655, codified by the Act of August 10, 1956, 70A Stat. 116 as 10 U.S.C. @ 1552.

- - - - -End Footnotes- - - - -

The fact that this court has the jurisdiction to review actions of military correction boards is not disputable. *Hertzog v. United States*, 167 Ct. Cl. 377, 383-384 (1964), and cases cited therein.

The scope of review in this case has been established by repeated pronouncements of this court requiring a showing of clear and convincing evidence of arbitrary or capricious action before the court will interfere with the findings by the Secretary of the military service or by a correction board that a person was erroneously or unjustly discharged from the service. *Unterberg v. United States*, 188 Ct. Cl. [**15] 994, 412 F. 2d 1341 (1969); *Ward v. United States*, 178 Ct. Cl. 210 (1967); *Furlong v. United States*, 153 Ct. Cl. 557 (1961).

In the absence of the required showing of arbitrary and capricious action by the BCMR, its determinations are final and binding. *Hoffman v. United States*, 175 Ct. Cl. 457 (1966).

We find that in this case plaintiff has failed to meet his burden of producing "cogent and clearly convincing evidence to warrant the substitution by this court of its judgment" for that of the military reviewing authorities, and to prove that the authorities' decision was arbitrary, capricious or erroneous in law. *Wood v. United States*, 176 Ct. Cl. 737, 743 (1966); *Stephens v. United States*, 174 Ct. Cl. 365, 374, 358 F. 2d 951 (1966); *Wales v. United States*, 132 Ct. Cl. 765, 130 F. Supp. 900 (1955).

Plaintiff makes numerous allegations of racial discrimination. However, exclusive of several minor social incidents at the Officers' Club, about which there is also more opinion than fact, there is no evidence of racial bias. This is particularly true on the part of those responsible for evaluating [*762] plaintiff, viz., his [**16] immediate colleagues and superiors. A finding of racial prejudice in this case would have to be irrationally imputed, based entirely on allegations, to a conspiracy against plaintiff at every level of the Air Force. The failure to prove these allegations makes such a finding impossible.

The allegation that plaintiff was conspiratorially denied promotion by his superior officers' wrongful placement of a reference to an AFR 36-2 proceeding before the first promotion Selection Board is also without foundation.

The records an Air Force Selection Board may consider are set out in AFR 36-89, paragraph 23, subparagraph d, as follows:

d. Records Considered. To insure all eligible officers equitable consideration, selection boards at HQ USAF use the Officer's Selection Folder (AFHQ Form 0-2078) and command selection boards use the Officer's Command Personnel Records Folder (AF Form 527) as the principal instrument for evaluating an officer's qualification for promotion. If there is also reasonably substantiated information not in these records which raises serious doubt as to an officer's suitability for promotion, it may be presented to the command selection board at the discretion [**17] of the major air commander concerned, or to the central selection board at the discretion of the Director of Military Personnel, HQ USAF. Selection boards are not authorized to consider letters of recommendation, or similar documents not authorized for inclusion in the selection folder. [Emphasis added.]

The Secretary of the Air Force is bound by these regulations. Hamlin v. United States, 183 Ct. Cl. 137, 141, 391 F. 2d 941 (1968), and cases cited therein. This regulation can reasonably be interpreted as allowing negative information of a serious nature that could impair a candidate's functioning as an officer, such as the circumstances precipitating an AFR 36-2 proceeding, to be before the Selection Board, and there is no Air Force regulation stating or implying the contrary. Presumption favors the validity of official military acts and, in the absence of contrary evidence, it is presumed the BCMR and the military personnel whom it is the Board's [*763] sidering all pertinent records relating to the plaintiff. Biddle function to correct, performed their functions properly, con- v. United States, 186 Ct. Cl. 87, 104 (1968); Holman v. United [**18] States, 181 Ct. Cl. 1, 383 F. 2d 411 (1967).

A mere reference to the discharge proceeding was before the Selection Board, not the actual proceeding. There is no indication whether the Selection Board even considered it. Most important is the fact that no Air Force regulation was violated. Therefore, the BCMR was not arbitrary or capricious in failing to find error where reference to a promotion candidate's discharge proceeding was placed before the Selection Board.

The evidence in this case strengthens and supports the presumption favoring the Air Force actions regarding plaintiff. The medical records show the flight surgeons and the psychiatrist gave plaintiff the benefit of the doubt regarding flight duty. He had been receiving this preference for at least four years regarding his ulcer. Plaintiff had drinking problems that on at least one

occasion prevented him from appearing for flight duty. Plaintiff also admitted serious recurring incidents of misconduct, primarily caused by drinking, and accepted several Article 15's, non-judicial punishment, n5 in lieu of fighting the charges in a court-martial action. Drinking problems also affected plaintiff's social conduct as [*19] an officer and the record contains evidence of poor social adjustment. The foregoing statements do not negate the fact that plaintiff generally was a good or slightly above average officer, who on occasion demonstrated fine capabilities. The point is that in light of such ambivalent evidence regarding plaintiff, and the long-standing principle that it is for the military to decide who is, and who is not, fit for service, there is no clear and cogent proof that the BCMR erred. n6

- - - - -Footnotes- - - - -

n5 Note 1, supra.

n6 The conclusions reached here apply equally to removal from flight duty, loss of hazardous duty pay, and to the denial of promotion.

In the recent case of Brenner v. United States, 202 Ct. Cl. 678, 693-694 (1973), cert. denied, 419 U.S. 831 (1974), this court declared reasons, applicable to the present case, for not involving itself in the fitness for service issue, as follows:

"The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualifications of all of the officers considered * * *. The Supreme Court expressed these principles very well in the case of Orloff v. Willoughby [345 U.S. 83 (1953)]."

- - - - -End Footnotes- - - - -

[**20]

[*764] The contention that an initial passover for promotion makes the second consideration an empty gesture is unacceptable because people do, in fact, receive promotions on their second consideration.

The BCMR was also not arbitrary or capricious in seeking advisory opinions regarding plaintiff. In accordance with BCMR investigatory functions, it is a long established practice to seek advisory opinions in evaluating an applicant's record of fitness for service, Hutter v. United States, 170 Ct. Cl. 517, 525, 345 F. 2d 828 (1965), n7 and a hearing is not required on these matters since the BCMR's function does not involve conducting adversary proceedings. In addition, the statute n8 empowering the BCMR, and the applicable regulations, do not require applicants be given a hearing, leaving the matter to the BCMR's discretion. This court will not hold the denial of a hearing improper where plaintiff failed to show, based on the documentation supporting the application, that the BCMR acted arbitrarily in denying the hearing. Kurfess v. United States, 169 Ct. Cl. 486 (1965).

- - - - -Footnotes- - - - -

n7 Hutter held a correction board may be arbitrary when it follows an inaccurate ex parte opinion, an issue not present in this case, but that does not bar the board's seeking such opinions. Merson v. United States, 173 Ct. Cl. 92, 98 (1965), and cases cited therein.

The correction board's quest for consultation and advice, unknown to plaintiff, was to his advantage as part of the board's search for trying to find a sufficient basis upon which a review hearing could be granted. [**21]

n8 Note 4, supra.

- - - - - - - - - - -End Footnotes- - - - -

For the foregoing reasons plaintiff is not entitled to recover. Accordingly, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiff's petition is dismissed.

Navy Bd of Corrections does not have to expressly follow, distinguish, or overrule prior board decisions, it is free to follow its procedures of case-by-case analysis for equitable relief

see pg 1577

602 F. SUPP. 1565 printed in FULL format.

RONALD S. STRANG, et al. v. JOHN O. MARSH, JR., et al.

Civil Action No. 83-0409 P

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE
ISLAND

602 F. Supp. 1565; 1985 U.S. Dist. LEXIS 22446

February 21, 1985

COUNSEL: [**1]

Bruce Hodge, Esq., Rhode Island, Gary Powers, Esq., Rhode Island Legal Services, Rhode Island, Barton F. Stichman, Esq., David F. Addestone, Esq., National Veterans Legal Services Project, Inc., Washington, District of Columbia, for Plaintiff.

Everett C. Sammartino, Esq., Assistant U.S. Attorney for Rhode Island, Providence, Rhode Island, for Defendant

JUDGES: Pettine, Senior Judge.

OPINIONBY: PETTINE

OPINION: [*1568] OPINION AND ORDER

PETTINE, Senior Judge

This is an action challenging the review procedures employed by Discharge Review Boards ("DRBs") and Boards for the Correction of Military Records ("BCMRs"), administrative bodies created by Congress to review and determine whether to recharacterize less than fully honorable discharges given to military personnel. In particular, plaintiffs seek declaratory and injunctive relief requiring the defendant boards expressly to follow, distinguish or overrule prior board decisions when an individual seeking upgrade cites a prior decision in his application. They argue that the Boards' asserted failure to respond adequately to citations of prior decisions violates the Boards' enabling statutes, 10 U.S.C. @@ 1552 and 1553; the Freedom of [**2] Information Act, 5 U.S.C. @ 552; the Administrative Procedure Act, 5 U.S.C. @@ 555, 557(c) and 706; and the Due Process Clause of the Fifth Amendment to the Constitution. The matter is currently before the Court on cross-motions for summary judgment and defendants' motion in the alternative to dismiss the complaint for failure to state a claim upon which relief may be granted. Jurisdiction is properly invoked pursuant to 28 U.S.C. @ 1331. n1

- - - - -Footnotes- - - - -

n1 In addition to @ 1331, the plaintiffs also allege jurisdiction under 28 U.S.C. @ 1361 and 5 U.S.C. @ 552. Amended Complaint, para. 1. Because the parties have not addressed the applicability of either provision, and because I have found jurisdiction proper under the federal question statute, I do not decide whether these separate bases of jurisdiction are properly invoked here.

- - - - -End Footnotes- - - - -

I. BACKGROUND

A. Parties

Plaintiffs in this action are seven individuals and two veterans' advocacy organizations. The seven individuals -- former members of the Army and Navy n2 [**3] -- were all discharged prior to the expiration of their term and given a less than fully honorable discharge. Each of the seven has unsuccessfully sought recharacterization of his discharge before a DRB and/or BCMR. n3 The organizational plaintiffs, Vietnam Era Veterans' Association ("VEVA") and Vietnam Veterans of American ("VVA") are non-profit groups who advance the interests of veterans and whose activities include representation of veterans before the discharge boards. Defendants are the Secretary of Defense and the Secretaries of the Army, Navy and Air [**1569] Force, respectively. These officials oversee the separation of military personnel from the armed forces and administer the BCMR's and DRB's, pursuant to 10 U.S.C. @@ 1552 and 1553.

- - - - -Footnotes- - - - -

n2 Plaintiffs Strang, Schofield and Guindon are former members of the Army. Plaintiffs Chambers, Paluga, Tullos and Romann are former members of the Navy, the latter two having been Marines.

n3 Of the seven individual plaintiffs, only Strang applied to a BCMR for relief. Although the Army BCMR granted him partial relief, it did not accord him the full reclassification he sought.

- - - - -End Footnotes- - - - -

[**4]

None of the plaintiffs seeks, through this action, judicial review of his adverse Board decision. Plaintiffs' Mem. In Supp. of Summ. Jmt., at 50. Rather, the plaintiffs challenge only the decisionmaking procedures employed by the Boards, and seek as relief: (1) a declaration that the Boards' failure to follow, distinguish or overrule prior decisions violates federal statutory and constitutional law; (2) an injunction prohibiting the defendants from pursuing this practice in the future; (3) an injunction ordering defendants to review past applications where Board decisions were cited and to prepare responses to those citations; and (4) an injunction ordering defendants to amend their regulations to include new procedures for responding to citations of past cases.

B. The Discharge Review Process

Upon separation from the armed services, an individual may receive one of five discharge characterizations: honorable; general or under honorable conditions; undesirable; bad conduct; and dishonorable. The first three types are awarded administratively, when the individual is terminated from the service; the latter two may be awarded only after a court-martial conviction. Unless an [**5] individual holds an honorable or general discharge, he may not receive veterans' benefits. See generally National Association of Concerned Veterans v. Sec. of Defense, 487 F. Supp. 192 (D.D.C. 1979); Lunding, Judicial Review of Military Administrative Discharges, 83 Yale Law Journal 33 (1973).

Prior to World War II, the only way a veteran could seek recharacterization of a discharge was to secure congressional passage of private relief legislation. Seeking to relieve itself of this burden, Congress in 1944 mandated that each military service establish a Discharge Review Board. Section 301, Serviceman's Readjustment Act of 1944, P.L. 346, 58 Stat. 284 (1944), codified at 10 U.S.C. @ 1553. In 1946, Congress additionally authorized the Secretary of each service to create a Board for the Correction of Military Records. Section 207, Legislative Reorganization Act of 1946, 80 Stat. 812, 837, amended by Act of Oct. 25, 1951, 65 Stat. 655, codified at 10 U.S.C. @ 1552. See generally, J. Glosser and K. Rosenberg, Military Correction Boards: Administrative Process and Review by the United States Court of Claims, 23 American U.L.Rev. 391 (1973).

The DRBs, each comprised [**6] of five military officers, are empowered to review any discharge, other than one issued by sentence of a general court-martial, and to reclassify a discharge, subject to review by the appropriate Secretary. n4 10 U.S.C. [*1570] @ 1553(a)-(b). Any veteran seeking DRB review is entitled to a hearing. @ 1553(c).

- - - - -Footnotes- - - - -

n4 Section 1553 provides:

@ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

The regulations governing DRBs are codified at 32 C.F.R. @ 70.3, et seq. (1984); 32 C.F.R. @ 581.2, et seq. (1984) (Army DRB); 32 C.F.R. @ 865.1, Subpart B, et seq. (1983) (Air Force DRB); 32 C.F.R. @ 724, et seq. (1984) (Navy DRB).

- - - - -End Footnotes- - - - -

[**7]

The BCMRs are comprised of civilian personnel and accorded greater power by Congress. n5 In addition to reclassifying discharges, a BCMR may actually change or correct the veteran's military records where "necessary to correct an error or remove an injustice." 10 U.S.C. @ 1552(a). A BCMR need not grant a hearing, however, *Kalista v. Sec. of the Navy*, 560 F. Supp. 608, 616 (D.Col. 1983), and while in limited circumstances it will review a case not yet heard by a DRB, it typically hears cases where a DRB has already denied full relief, see *Lunding*, supra at 41-42.

- - - - -Footnotes- - - - -

n5 In pertinent part, @ 1552 provides:

@ 1552. Correction of military records; claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. . . .

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to --

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

The regulations governing BCMRs are codified at 32 C.F.R. @ 581.3, et seq. (1984) (Army BCMR); 32 C.F.R. @ 865.1, Sub-part A, et seq. (1983) (Air Force BCMR); and 32 C.F.R. @ 723.1, et seq. (Navy BCNR).

- - - - -End Footnotes- - - - -
[**8]

In 1977, Congress enacted legislation mandating that veterans' benefits be paid pursuant to a DRB-upgraded discharge only after a "case-by-case review" by the DRB under "published uniform standards." 38 U.S.C. @ 3103(e) (1). n6
Thereafter, the [*1571] Department of Defense promulgated standards setting forth the factors to be considered in determining whether to upgrade a discharge. See 32 C.F.R. @ 70.3, et seq. Under these standards, a discharge may be characterized as improper, see @ 70.9(b), or inequitable, see @ 70.9(c). n7

- - - - -Footnotes- - - - -

n6 Section 3103(e)(1) provides:

Notwithstanding any other provision of law, (A) no benefits under laws administered by the Veterans' Administration shall be provided, as a result of a change in or new issuance of a discharge under section 1553 of title 10, except upon a case-by-case review by the board of review concerned, subject to review by the Secretary concerned, under such section, of all the evidence and factors in each case under published uniform standards (which shall be historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting or denying such change or issuance) and procedures generally applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions; and (B) any such person shall be afforded an opportunity to apply for such review under such section 1553 for a period of time terminating not less than one year after the date on which such uniform standards and procedures are promulgated and published.

[**9]

n7 Review for "propriety" looks to whether a discharge was illegal when it was given, or has effectively been rendered illegal by subsequent policy changes made expressly retroactive to the type of discharge at issue. Review for equity looks to whether, considering all the factual circumstances surrounding an applicant's history and service record, as well as current service policy, an otherwise proper discharge ought to be upgraded as a matter of equity. Only discharges granted under the equitable standards are at issue here, for the defendants state that they consider themselves bound to follow, distinguish or overrule prior cases involving the propriety of a discharge. Def.Mem.Obj. to Pl. Motion for Summ Jmt., at 3-4.

- - - - -End Footnotes- - - - -

Principally at issue in this case is the defendants' policy with respect to the citation by applicants of past "equitable" decisions. The regulations state that when an applicant cites a prior equitable decision granting an upgrade as binding on the Board:

the decisional document shall note that the DRB is not bound by its discretionary decisions in prior cases [**10] under the [equitable standards]. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered under the equity standards and addressed . . .

32 C.F.R. at @ 70.8(e)(iii)(D).

The regulations, thus, compel the Boards to respond to the substantive "issue" raised by citation of a prior case, but do not compel the Boards to cite differing facts or circumstances if a different result is reached. The regulations elsewhere make explicit the Department's position regarding prior equitable decisions:

The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercises its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issue of equity.

32 C.F.R. at @ 70.9(b) (3)

Alone among the defendants named in this suit, the Army, however, has voluntarily promulgated [**11] its own DRB regulations obligating it to follow cited equitable cases or to distinguish them. 32 C.F.R. @ 581.2, Appendix B, @ 4(k) (1983). n8 Accordingly, this regulation separates the official policy of the Army from that of the Navy or Air Force, with respect to the central issue of this case.

- - - - -Footnotes- - - - -

n8 This regulation provides:

As a general matter, like cases should receive like treatment. However, the existence of certain similarities between a particular case and a past case decided by a Board does not necessarily require that the two be decided identically because there may be differences that require differing results. For example, differing results may be compelled by factual distinctions, differing equities, changes in policy, the credibility of witnesses and other evidence.

32 C.F.R. @ 581.2, App. B, para. 4(K). The parties agree that by adopting this regulation, the Army has "stated (that it is the) policy of the Army DRB . . . to follow cited cases or to distinguish them." Pl. Reply Mem., at 5 (footnote omitted). See Decl. of Col. James Rowe, President of Army DRB, para. 11.

- - - - -End Footnotes- - - - -

[**12]

The Department of Defense regulations governing the procedures to be employed by Boards, including those governing the treatment of cited past decisions, grew out of a prior lawsuit between veterans' groups and the defendants in this action. *Urban Law Institute of Antioch College v. Sec. of Defense*, Civ. No. 76-0530 (D.D.C.) (hereafter, "Urban Law"), culminated in two stipulations [*1572] of settlement which obliged the Boards to adopt the procedures now

set forth at 32 C.F.R. @ 70.3, et seq. These procedures include preparing statements of findings and reasons for all DRB and BCMR decisions; making available and indexing prior board decisions; preparing "decisional documents" according to a specific format; and establishing a Joint Service Review Activity ("JSRA") to review complaints concerning failure to comply with the new decision-making procedures. See 4 Mil.L.Rep. 6012-6016 (May-June 1976) (reprinting 1977 stipulation); 44 Fed.Reg. 37771, et seq. (August 26, 1982) (reprinting 1982 stipulation). The parties to that litigation, however, expressly left open the question whether federal statutory or constitutional law requires the Boards to follow, distinguish [**13] or remove past equitable decisions:

Plaintiffs take the following position: The DRBs, like other federal agencies, are required by fundamental principles of administrative law and due process to adjudicate similarly situated cases in a similar manner. Plaintiffs further take the position that this principle requires that when an applicant cites a prior DRB decision . . . and claims that the DRB should grant an upgrade in his case because the facts are similar to those in the cited cases, the DRB, if it denies relief, must cite differing facts, differing standards, changes in policy, or reasons for disavowing the prior decision. The Department of Defense does not agree that the DRBs must respond in the manner stated by plaintiffs when an applicant cites a case involving an issue of equity. . . . The parties agree, however, that this disagreement involves a matter of substantive law that is beyond the scope of . . . this case.

44 F.R. at 37776, col 3.

The 1982 agreement went on to provide that in the event of a future "final, authoritative judicial decision requiring that prior decisions" "be distinguished in the manner stated by plaintiffs," 44 F.R. at 37777, col. [**14] 1, veterans or their counsel could compel the Boards to rewrite statements of reasons in all past cases which cited other decisions. Id. at 37777, col. 1. Having exacted this contractual promise from defendants, plaintiffs now seek the "final, authoritative judicial decision" declaring the Boards bound to follow past Board cases or expressly to distinguish them.

II. PRELIMINARY ISSUES

At the threshold, I must determine whether, under governing principles of justiciability and reviewability of administrative action, the plaintiffs may properly seek judicial review of the Boards' procedures. The plaintiffs' challenge is framed in an unusual fashion: their claim is that they were subjected to unlawful decision-making procedures, yet no plaintiff seeks review of the substance of his adverse Board decision on the grounds that it was rendered arbitrary, capricious, unsupported by substantial evidence, or otherwise unlawful, 5 U.S.C. @ 706; see *Kalista v. Sec. of Navy*, supra, 560 F. Supp. at 612 (collecting cases); *Lunding*, supra, at 55-57 (discussing application of substantial evidence standard of review to Board decisions), by the Board's failure to treat an applicant [**15] as it had treated a similarly situated, prior applicant. n9 Accordingly, I must first decide whether the Administrative Procedure Act permits plaintiffs to mount this essentially collateral challenge to defendants' procedures.

- - - - -Footnotes- - - - -

n9 In light of the fact that no plaintiff seeks review of his discharge or the decision denying him an upgrade, defendants' argument that the six-year statute of limitations found in 28 U.S.C. @ 2401(a), or the doctrine of laches, should bar review is wholly without merit and I reject it.

- - - - -End Footnotes- - - - -

A. Standing

A party has standing to challenge agency action where he (1) demonstrates an "injury in fact" as a result of the agency action and a substantial likelihood that the relief sought will redress the injury and (2) demonstrates that the injury alleged or "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional [*1573] guarantee in question." Association of Data Processing Service Organizations v. [*16] Camp, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); Rental Housing Association of Greater Lynn v. Hills, 548 F.2d 388, 389 (1st Cir. 1977). "The [administrative] standing inquiry focuses on the substance of the agency action, its adverse impact on the plaintiff and the types of interests that the applicable law is designed to protect." Capital Legal Foundation v. Commodity Credit Corp., 228 U.S. App. D.C. 467, 711 F.2d 253, 259 (D.C. Cir. 1983).

The plaintiffs' complaint sets forth three broad classes of injury allegedly sustained by plaintiffs: (1) the injury to unsuccessful applicants who retain less than honorable discharges and suffer the associated stigma and pecuniary loss, Amended Complaint ("Compl.") para. 30; (2) the injury to unsuccessful applicants who have been denied a fair and consistent administrative process in which to press their cases, Compl. para. 31; and (3) the injury to the organizational plaintiffs, who claim that, absent a rule requiring the Boards to distinguish prior decisions not followed, they are unable to represent effectively veterans seeking recharacterization. Compl., para. 32.

I am satisfied that the seven individual plaintiffs, [*17] as well as plaintiff VVA, who asserts standing to litigate the rights of its members who have unsuccessfully applied to the Boards, Compl. paras. 10, 31, see Warth v. Seldin, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), n10 possess standing to challenge the procedures at issue here. The primary injury to each individual is having to retain a less than honorable discharge under allegedly unfair and inequitable circumstances -- an injury that falls squarely within the zone of interests protected by the Boards' enabling statutes and regulations, the Administrative Procedure Act and the Due Process Clause. It is less clear that these plaintiffs can demonstrate a "substantial likelihood" that the remedy they seek will redress this injury, for they do not seek review of their assertedly unfair and inequitable Board decisions. But these plaintiffs do seek an order effectively compelling defendants to reconsider their applications and to distinguish cited past decisions. Because this relief, if granted, could well lead to new Board decisions on the merits of the plaintiffs' individual cases, I conclude that this branch of the standing inquiry is satisfied. Accordingly, [*18] I rule that the individual plaintiffs and VVA, on behalf of its members, have standing in this action.

- - - - -Footnotes- - - - -

n10 A membership organization like VVA "has standing to bring suit on behalf of its members when:

(a) its members would otherwise have standing to sue in their own rights; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit."

Rhode Island Chapter, Associated General Contractors of America v. Kreps, 450 F. Supp. 338, 346, note 3 (D.R.I. 1978) (quoting Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)). I rule that VVA satisfies these three requirements and reject defendants' claim that the presence of each individual VVA member is indispensable in this action. Insofar as plaintiffs seek relief on a purely legal question of administrative procedure, the participation of individual members would add nothing to this lawsuit.

- - - - -End Footnotes- - - - -
[**19]

Because plaintiff VEVA has no members, Complaint para. 4, it must establish standing to litigate on its own behalf, "to vindicate whatever rights and immunities the association itself may enjoy." Warth, supra at 511. I cannot conclude that the organization's own interests in the adjudicative process employed by the defendant boards fall arguably within the zone of interests protected by the statutes and constitutional provisions invoked here, for VEVA "cannot apply to a DRB [or BCMR], itself [and] it is incapable of suffering injury at the hands of a DRB [or BCMR]." National Ass'n of Concerned Veterans, supra, 487 F. Supp. at 197 (denying standing of veterans' advocacy organization to challenge DRB review standards promulgated by Department of Defense). Because VEVA cannot suffer substantive harm as a result of action by [**1574] the defendant boards, I conclude that it lacks the type of injury necessary to invoke this Court's remedial powers. Cf. Capital Legal Foundation, supra, 711 F.2d at 259-260 (advocacy organization may not challenge infringement of its APA-created right to participate in notice and comment rule making process absent substantive injury [**20] as a result of rule ultimately promulgated). Accordingly, I hold that VEVA lacks standing to litigate its claims in its own right. n11

- - - - -Footnotes- - - - -

n11 The sole claim that plaintiff VEVA would have standing to litigate is the claim that the Freedom of Information Act, 5 U.S.C. @ 552, entitles them to the factual distinctions they seek. This is so because defendants argue that the FOIA "creates a right in any member of the public to compel an agency to write a proper statement of findings and reasons in another person's case." Pl.Mem. In Supp. of Sum. Jmt., at 47. While such an allegation is likely sufficient to bring VEVA within the zone of interests of the FOIA, I find that this claim is without merit and must be dismissed. Plaintiffs fail specifically to address this claim at any length in their memoranda or to cite any authority construing the requirements of the FOIA to entitle them to the relief sought here. Indeed, their argument seems to be that it is the FOIA, in combination with the Urban Law settlement, that entitles them to judgment here. To the extent that it is that settlement, and not the FOIA by its own terms, upon which plaintiffs rely, this claim amounts to little more than a request for enforcement of the Urban

Law settlement. Any such request must be made to the court where that litigation was pending, e.g., *Lee v. Hunt*, 483 F. Supp. 826, 832, (W.D.La. 1979), *aff'd*, 631 F.2d 1171 (5th Cir. 1980), *cert. den.* 454 U.S. 834, 70 L. Ed. 2d 112, 102 S. Ct. 133 (1981). And the terms of the settlement are without collateral estoppel effect in this Court because the stipulation is not a decision on the merits. 18 *Wright, Miller & Cooper, Federal Practice and Procedure*, @ 4443, at 385 (1981). Accordingly, absent any showing by plaintiffs that the FOIA entitles them to the broad relief sought here, I dismiss that claim entirely.

- - - - -End Footnotes- - - - -
[**21]

B. Reviewability

I must next decide whether the Administrative Procedure Act permits plaintiffs to challenge administrative procedures without seeking review of the substantive agency decision rendered pursuant to the allegedly illegal procedures. Defendants argue that the Act limits the Court to determining only whether a particular Board decision was "arbitrary, capricious or unsupported by substantial evidence." *Def. Supp. Memo. in Support of Summ. Jmt.*, at 69.

The APA defines agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. @ 551(13). Because the plaintiffs expressly decline to seek review of any individual discharge decision, the only "action" they can be challenging here is the defendants' failure to promulgate, adopt or observe a rule requiring that binding effect be accorded prior factually similar decisions, and that distinctions be provided. If this "failure" is properly characterized as agency inaction, then it would be subject to judicial review, for "under both general equitable powers and powers granted under the APA, courts can insure that statutory [**22] rights are not denied by agency inaction." *Caswell v. Califano*, 583 F.2d 9, 15 (1st Cir. 1978) (citations omitted). Cf. 5 U.S.C. @ 706(1). Because plaintiffs argue that the Boards' enabling statutes, as well as the Due Process Clause, entitle them to rely on prior Board cases and to have cited cases distinguished or followed, I will consider the alleged failure of defendants to adopt or observe a rule effectuating that "right" an "agency action" under the APA. Although so characterizing the procedural question here may stretch @ 551(13) to its limits, see *Hall v. Equal Employment Opportunity Com'n*, 456 F. Supp. 695, 700 (N.D. Cal. 1978), in view of the "hospitable" interpretation to be given the APA's "generous review provisions," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 99 L. Ed. 868, 75 S. Ct. 591 (1955)); see also *Falzarano v. U.S.*, 607 F.2d 506, 512 (1st Cir. 1979), I believe this characterization is consistent with the Act.

The Administrative Procedure Act further provides that:

Agency action made reviewable by statute and final agency action [**23] for which [**1575] there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.
5 U.S.C. @ 704.

Section 704 has been construed to predicate the availability of judicial review upon (1) the exhaustion of administrative remedies and (2) the existence of a final agency action. See, e.g., *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1178 (D.C. Cir. 1979) (Leventhal, J., concurring).

1. Exhaustion

The defendants vigorously argue that the plaintiffs should be required to exhaust their administrative remedies by seeking BCMR and JSRA review of adverse DRB decisions. They rely on the exhaustion doctrine set forth in *Elton Orchards Inc. v. Brennan*, 508 F.2d 493 (1st Cir. 1974), which admonished that requiring litigants to exhaust "prevent[s] the disruption of administrative processes by withholding judicial review until the agency has developed the relevant facts, applied its expertise and exercised the discretion entrusted to it by law," *id.* at 497 (citing *McKart v. United States*, 395 U.S. 185, 193-94, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969)). Plaintiffs respond that where further resort to agency processes would be "futile," it is well settled that failure to exhaust will not bar judicial review. See, e.g., *id.* at 498; *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980). They argue that where, as here, the Secretary has taken a firm position on the disputed issue, exhaustion would serve none of its customary purposes.

I agree that resort to the BCMR and JSRA would, indeed, be futile for the Navy and Air Force plaintiffs, for those two branches of the service have not diverged from the position taken by the Secretary of Defense in the Urban Law settlement and embodied in the regulations promulgated pursuant to that agreement. In light of the Secretary's stated policy, it would surely be futile to require the plaintiffs to seek a reversal of that policy from subordinate entities bound by the Secretary's determination. Likewise, development of a fuller factual record and deference to the Boards' expertise in substantive matters would be of little use where the question is a pure question of federal law. Cf. *Lopez v. Heckler* [**25], 725 F.2d 1489, 1500 (9th Cir. 1984). Accordingly, because the individual plaintiffs' failure to exhaust in such a circumstance does not jeopardize the interests protected by the exhaustion doctrine, I rule that the individual Navy and Air Force plaintiffs, as well as VVA on behalf of its former Navy and Air Force members, need not exhaust their administrative remedies.

I cannot say with equal certainty, however, that exhaustion would be futile for the Army plaintiffs. For the Army has voluntarily adopted a rule which, according to both plaintiffs and defendants in this action, obligates it to distinguish past cases if they are not followed. See 32 C.F.R. @ 581.2, Appendix B, para. 4; note 8, *supra*; Plaintiffs' Reply Memorandum, at 4 ("one matter on which the parties agree is that the stated policy of the Army DRB is to follow cases or to distinguish them.") (footnote omitted). Given the Army's position on this matter, the Army plaintiffs might well secure relief from an adverse DRB decision in which past citations were not distinguished, on the basis of this regulation. The plaintiffs argue that the Army routinely ignores its policy, such that exhaustion would effectively [**26] be futile. But I cannot accept the limited evidence before me as sufficient to establish any such systematic violation. Accordingly, I rule that the Army plaintiffs must exhaust their administrative appeals from adverse Army decisions.

2. Final Agency Action

There would appear to be little question that the "action" of the defendants in failing to adopt the rule plaintiffs seek is "final." The only important question [*1576] relevant to finality here is whether the language of @ 704, which states that a "procedural . . . action or ruling not directly reviewable is subject to review on review of the final agency action," means that review of procedural "actions" may only be had on final substantive review.

I do not read the Act to impose this absolute limitation. The statutory language "not directly reviewable" suggests that Congress did intend that at least some residual category of procedural action (or inaction) be directly reviewable. Where, as here, the interests of efficiency and economy would surely be served by adjudicating in a single proceeding a purely legal question likely to be raised in numerous individual proceedings, direct review would not appear inconsistent [**27] with the review scheme embodied in the Act. Further, while the question of law posed in this action would be a proper question for an aggrieved applicant to raise on judicial review of his or her individual Board decision, it is possible that a court discharging its duty to review the substantive administrative decision under @ 706 could do so without resolving this question of law. n12 Cf. *Caswell v. Califano*, supra, at 14. Accordingly, not only judicial economy, but the interests of the public and the litigants in resolving this long-contested question, as well, counsel strongly here for directly reviewing the question whether the plaintiffs are entitled by federal law to the declaratory and injunctive relief they seek. Cf. *Metropolitan Property & Liability Ins. Co. v. Kirkwood*, 729 F.2d 61, 63-64 (1st Cir. 1984) (even where another remedy exists, declaratory judgment appropriate if alternative is "neither simple nor totally adequate," and efficiency, relief of uncertainty, and public and litigants' interests would be served by declaratory relief). Because I find that review of this legal question would neither subvert nor circumvent the APA framework for review, I [**28] will proceed to the merits of the plaintiffs' claims. n13

- - - - -Footnotes- - - - -

n12 If, for example, the reviewing court reversed an agency determination on another ground, or held that the prior Board decisions cited by the applicant were insufficiently like the applicant's case even to call into question whether any duty to distinguish prior cases obtained, see, e.g. *Blackwell v. Marsh*, 574 F. Supp. 210, 213 (N.D. Ga. 1982), the legal issue posed here would not be resolved by that reviewing court.

n13 The APA also prevents a court from reviewing agency action to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion." 5 U.S.C. @ 701; see *Dugan v. Ramsay*, 727 F.2d 192, 194 (1st Cir. 1984). While the defendants have not specifically invoked either of these provisions as a bar to review here, they have argued, through associated doctrines, that judicial review of the defendants' decisionmaking procedures would improperly invade the province of the military, whose authority and autonomy in prescribing discharge review procedures is, in defendants' view, plenary. In arguing that the question before the Court is (1) a political question not susceptible of judicial review and (2) a military decision made unreviewable by the doctrine of *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), defendants are invoking doctrinal variants of the statutory "agency discretion" exception.

Although my discussion of the merits of plaintiff's claims makes plain that I

read Congress to have given the defendant Boards considerable discretion in making discharge recharacterization decisions, I do not think that this grant of discretion was meant wholly to preclude judicial review of the legality of the procedures employed by the Boards. As Judge Breyer has pointed out, "the fact that an agency enjoys broad discretionary powers does not mean judicial review is forbidden; it simply means that the reviewing court is unlikely to find against the agency for the agency is unlikely to have acted unlawfully." *Dugan v. Ramsay*, supra, at 195 (citations omitted).

Nor do I construe the question presented here to be a nonjusticiable political question, within the meaning of *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) and its progeny. The defendants urge that judicial review of this issue would be inappropriate given the "textually demonstrable commitment of the issue to a coordinate political department" and the "lack of judicially discoverable and manageable standards for resolving it." Def's Supp. Memo at 56, quoting id. at 217. Defendants offer no explanation as to why the Court could find no manageable standards to resolve this question. No such reason being apparent to the Court, I reject that argument. I likewise reject the notion that resolution of this issue is constitutionally committed to the Executive. For unlike cases which would enmesh a court in numerous "professional military judgments" regarding matters about which the court knows little, e.g. *Gilligan v. Morgan*, 413 U.S. 1, 10, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973), this case creates no such risk. To the contrary, plaintiffs ask this Court to perform its classic function in the administrative arena: to determine whether an agency created by Congress has acted lawfully.

Finally, I reject the argument that the doctrine enunciated in *Mindes v. Seaman*, supra, bars review of the question raised here. That doctrine is concerned with judicial interference in internal military matters. See, e.g., *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972) (question whether court should restrain Air Force from discharging officers); *Cushing v. Tetter*, 478 F. Supp. 960, (D.R.I. 1979) (question whether court should enjoin Navy from returning serviceman to his former unit). Here, by contrast, the Court is asked to perform the duty imposed on it by Congress, through the APA, to determine whether congressionally-created administrative bodies have adopted illegal or unconstitutional administrative procedures for dealing with claims by ex-military personnel. Especially where the plaintiffs seek no review of the substantive rules employed by the military in making discharge decisions, I find that no credible risk of impairing military functions is posed by this challenge, cf. *Dugan v. Ramsay*, supra, 727 F.2d at 195 (review of military actions barred when "the very act of reviewing may impede the agency's ability to carry out its functions"), and do not, therefore, apply the *Mindes* test for reviewability. In any event, my decision on the merits of this case renders the nonapplication of *Mindes* of little importance.

- - - - -End Footnotes- - - - -
[**29]

[*1577] III. THE CHALLENGED DECISIONMAKING PROCEDURES

The United States Supreme Court has admonished that, while courts must "of course . . . determine whether [an] agency complied with procedures mandated by the relevant statutes," *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 549, 55 L. Ed. 2d 460, 98 S. Ct. 1197, n.21, "absent constitutional constraints or extremely compelling circumstances the 'administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their

multitudinous duties.' " Id. at 543, quoting F.C.C. v. Schreiber, 381 U.S. 279, 290, 14 L. Ed. 2d 383, 85 S. Ct. 1459 (1965), quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 84 L. Ed. 656, 60 S. Ct. 437 (1940). Accordingly, in order to grant the relief sought by plaintiffs, I must find a statutory or constitutional command that the defendants adopt a rule obligating them to provide the factual distinctions sought.

Plaintiffs contend that the failure to adopt such a rule violates the Boards' statutory mandate for "uniform treatment of applicants" and [**30] the canons of fair decisionmaking embodied in the Administrative Procedure Act and protected by the Due Process Clause. Essentially, plaintiffs argue that these provisions require that the Boards develop an administrative common law of discharge recharacterization, upon which an applicant can rely in seeking relief. Defendants counter that the detailed procedures for decisionmaking and decisionwriting set forth in their regulations satisfy the strictures of the federal statutory and constitutional provisions invoked by plaintiffs. They further argue that compelling them to adopt the rule plaintiffs seek would not only be unwarranted by, but indeed inconsistent with, the Boards' statutory mission to balance equitable factors on a case-by-case basis, and would be costly, cumbersome and impractical.

On its face, the statute authorizing the creation of BCMRs, 10 U.S.C. @ 1552, contains no requirement that the BCMRs provide the factual distinctions plaintiffs seek. n14 Indeed, that section expressly provides that BCMR review be conducted "under procedures established by [the Secretary] and approved by the Secretary of Defense." @ 1552(a). Congress having confided in the BCMRs the [**31] power and discretion to fashion their own procedures, @ 1552 can hardly be the statutory mandate for the rule plaintiffs seek.

- - - - -Footnotes- - - - -

n14 Plaintiffs indicate that they seek a rule requiring the BCMRs to provide factual distinctions "when an applicant argues that relief should be granted in his case because the applicant's case is similar to an earlier case in which the [DRB or BCMR] held that the uniform discharge review standards set forth in 32 C.F.R. @ 70.9 required an upgrade in discharge." Pl.Mem.In Supp. Sum.Jmt., at 14. Accordingly, there is no claim that the BCMRs must follow prior BCMR decisions which do not involve application of the uniform standards -- a sharply limited class of BCMR decisions in any event.

- - - - -End Footnotes- - - - -

[*1578] Section 1553, creating the DRBs, does not give these Boards similar license to formulate procedures. The statute expressly requires that DRBs accept evidence, grant applicants a hearing and permit representation by counsel. @ 1553(c); see Wilson v. Secretary of the Navy, 417 [**32] F.2d 297, 298 (3d Cir. 1969), cert. den. 397 U.S. 1068, 25 L. Ed. 2d 689, 90 S. Ct. 1507 (1970). Like @ 1552, however, the statute is silent as to whether DRB decisions are to be accorded binding effect and distinguished or followed in the manner plaintiffs describe.

In urging that @ 1553 does contain such a command, plaintiffs rely heavily on 38 U.S.C. @ 3103, the 1977 veterans' benefits legislation that required the DRBs to promulgate the "uniform standards" now codified at 32 C.F.R. @ 70.3, et seq. The critical language in that statute provides that no benefits shall be paid

pursuant to an upgraded discharge "except upon a case-by-case review by the board of review concerned, subject to review by the secretary concerned, under such section, of all the evidence and factors in each case under published uniform standards (which shall be historically consistent with criteria for determining honorable service and shall not include any criteria for automatically granting or automatically denying such change or issuance)" 38 U.S.C. @ 3103(e)(1). The question raised is whether the requirement of "published uniform standards" to be based on criteria "historically consistent [**33] with criteria for honorable service," embodies a command that the DRBs factually distinguish prior cited cases. I conclude that it does not.

The principal purpose of @ 3103(e)(1) was "to prevent the award of veterans' benefits to individuals who automatically received upgraded discharges under the clemency programs [for Vietnam veterans] initiated by Presidents Ford and Carter." *National Association of Concerned Veterans v. Secretary of Defense*, supra, 487 F. Supp. at 204 (citing S.Rep. No. 305, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 580, 95th Cong., 1st Sess. (1977); reprinted at 1977 U.S.C.C. & A.N. 2844). In enacting the law and rejecting the special standards for Vietnam era veterans, Congress sought to redress the perceived "large-scale departure from fundamental historic principles for the granting of veterans' benefits which are not being applied even-handedly to all former service personnel," H.R. Rep. 95-580, reprinted in 1977 U.S.C.C. & A.N. at 2853-54. Accordingly, it required that "the same criteria for upgrading the discharges of this special class of former service persons as a matter of equity be made available to veterans of all periods of war [**34] , rather than the carefully prescribed period currently in effect." Id. at 2856-57. The legislative history makes plain, then, that @ 3103 was principally concerned with the inequity of according only Vietnam veterans favored treatment and not with any lack of decisional consistency in DRB determinations. Plaintiffs vigorously maintain, however, that the requirement that DRBs promulgate "published uniform standards" -- for the first time in DRB history, 123 Cong. Rec. H30552 (Sept. 23, 1977) (remarks of Rep. Hammerschmidt) -- did more than eradicate the Vietnam preference. They argue that this requirement was a broad mandate for consistency in discharge review that can be achieved only if the Boards are forced to distinguish, follow or overrule prior decisions rendered under these standards.

To be sure, @ 3103(e)(1) was intended to standardize the process. Senator Cranston, the bill's architect, noted that the requirement of uniform standards would eliminate both the historical disparities in upgrade results among the services and the DRBs' traditional practice of setting forth review guidelines only in internal, unpublished memoranda. 123 Cong. Rec. S28196 (Sept. 8, 1977) (remarks [**35] of Sen. Cranston). But the critical fact is that Congress chose to achieve this evenhandedness by ordering the promulgation of uniform standards to be applied, on an equitable basis, to each case -- not by transforming the DRBs, sub silentio, into mini-courts of law, bound to reach results according to those reached in prior cases or to parse factual distinctions [**1579] in support of a different result. Had Congress wished so drastically to alter the historically equitable nature of DRB review, it is reasonable to assume that it would have so indicated. Instead, the language of @ 3103(e)(1) itself (1) prohibits any process that would "automatically" entitle any veteran to an upgrade -- as a strictly precedential approach would tend to do by treating each decision as establishing a binding rule of law entitling future applicants to relief -- and (2) underscores the equitable, fact-based, nature of each "case-by-case review." Accordingly, I cannot find in 10 U.S.C. @ 1553, as modified by @ 3103(e)(1), the mandate plaintiffs seek.

Nor does this reading of the Boards' enabling statutes leave those veterans unfairly treated bereft of redress. For, in addition to pursuing available [**36] administrative remedies, any aggrieved applicant may secure judicial review of an adverse determination under @ 706 of the APA, which empowers the reviewing court to determine whether the Board's application of the published standards to the applicant's record was arbitrary, capricious, unsupported by substantial evidence or not in accordance with the law. In discharging its obligation, the court would have before it the entire administrative record, including any prior Board decisions cited and submitted to the Board by the applicant, in accordance with the provisions of 32 C.F.R. @ 70.8(a) (4) (iv) (requiring that copy of decision cited be attached to application). If, based on the evidence in the record, prior application of the standards, or any other appropriate consideration, the court determined that the Board's application of its standards to the applicant's record was improper or beyond the bounds of the Board's discretion, within the meaning of @ 706, that court would be fully able to grant appropriate relief. Notwithstanding the availability of this remedy for any unfair or inconsistent application of the standards, rising to the level of arbitrary, capricious, unsupported [**37] by substantial evidence or not in accordance with law, e.g. *Blackwell v. Marsh*, supra, plaintiffs would have me declare the failure of a Board to distinguish or follow cited cases to be per se violative of the Boards' enabling statutes and the APA. With respect to the APA, plaintiffs apparently argue that the failure to distinguish is inherently arbitrary. If accepted, however, such a reckoning of the Boards' obligations would subject these agencies to a duty to distinguish stricter than that imposed on courts of law. Finding nothing in the Boards' enabling statutes, or @ 706 of the APA, to support this extraordinary result, I reject this argument. While the Boards might well protect their own decisions from judicial reversal by making clear why one applicant is not entitled to the relief given a prior applicant under similar factual circumstances, I cannot find in these statutory provisions a requirement that the Boards adopt the wooden rule of distinctions plaintiffs seek.

Plaintiffs also argue that @ 555(e) n15 of the APA imposes on the Boards a per se duty to distinguish or follow cited cases. That section protects the right of each applicant to be told by [**38] the Board why his or her application was rejected. *Roelofs v. Secretary of the Air Force*, 202 U.S. App. D.C. 307, 628 F.2d 594 (D.C.Cir. 1980). Plaintiffs claim that this section cannot meaningfully ensure that a reviewing court will be able to determine whether similarly situated applicants have been accorded like treatment, absent the rule they seek.

- - - - -Footnotes- - - - -

n15 5 U.S.C. @ 555(e) provides:

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

- - - - -End Footnotes- - - - -

Courts have consistently held, however, that the reasons requirement imposed by @ 555(e) on the Boards is "modest", *Roelofs*, supra, 628 F.2d at 601, and

does not entitle the applicant to "an extensive exegesis of the underlying reasoning," *Neal v. Secretary of the Navy* [**39], 639 F.2d 1029, 1038 [*1580] (3d Cir. 1981). Indeed, by its terms, @ 555(e) requires only "a brief statement of the grounds for denial."

Significantly, by virtue of the Urban Law Institute settlement, the Boards have voluntarily obligated themselves to provide a more extensive and particularized statement of reasons than that required by @ 555(e) alone. Indeed, while the DRB regulations do not require the factual distinctions sought by plaintiffs, they do require response to any "issue" or "principle" raised by prior cited cases. See p. 1571, *supra*. Yet plaintiffs nonetheless argue that even the rather minimal strictures of @ 555(e) are violated by the defendants' failure to provide distinctions from prior decisions. They rely heavily on *Matlovich v. Secretary of the Air Force*, 192 U.S. App. D.C. 243, 591 F.2d 852 (D.C.Cir. 1978), where the court ordered the Air Force Administrative Discharge Board ("ADB") to explain more fully why, in applying a generalized regulation regarding homosexuality, it had decided not to retain a homosexual serviceman with a superior service record. Such explanation was deemed to be necessary, *inter alia*, to "show the reviewing [**40] court . . . that the particular airman was not treated differently from others in the same position," 591 F.2d at 860. In *Matlovich*, however, the court predicated its holding on the "absence of articulated standards, policies, or considerations" guiding the Air Force in implementing its umbrella regulation permitting retention of homosexuals under "unusual circumstances." *Id.* at 856. Yet, in this case, the defendants have promulgated exactly the published standards found wanting in *Matlovich*, and it is those standards, in tandem with the self-imposed reasons requirements embodied in the defendants' regulations, which amply enable a reviewing court to ensure that similarly situated individuals have been judged under the same standards and that the Board has not been "arbitrary, capricious or unlawful in exercising its discretion whether to [recharacterize a discharge]." *Id.* at 857.

Finally, plaintiffs also cite an impressive array of administrative law cases holding that agencies must follow, distinguish or overrule their own precedent, e.g. *Steger v. Defense Investigative Service*, 230 U.S. App. D.C. 345, 717 F.2d 1402, 1406 (D.C. Cir. 1983); *McHenry v. [**41] Bond*, 668 F.2d 1185, 1192-93 (11th Cir. 1982); *Jones v. Califano*, 576 F.2d 12, 20 (2d Cir. 1978), in support of the argument that the APA entitles them to the relief they seek. While the Supreme Court has not yet adopted this rule, compare e.g., *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187-88, 36 L. Ed. 2d 142, 93 S. Ct. 1455 (1973) with *Secretary of Agriculture v. United States*, 347 U.S. 645, 653, 98 L. Ed. 1015, 74 S. Ct. 826 (1954), all the circuits have articulated a version of this rule, at least where formal agency action is concerned. K. Davis, *Administrative Law Treatise*, @ 20.11 at 39 (collecting cases). The First Circuit, for example, has held that an agency may "repudiate" any policy or norm which created a "precedent", so long as "appropriate notice" is afforded and sufficient "clarity of analysis" provided to explain the repudiation. *Public Interest Research Group v. F.C.C.*, 522 F.2d 1060, 1065 (1st Cir. 1975). I do not, however, read this sound body of authority to compel the procedure plaintiffs seek. First, the defendants do apply the identical published standards, or rules of decision, to each case. If the discharge Boards [**42] applied new standards to applicants, "without ever saying why", I would agree with plaintiffs that this would be "archetypical of arbitrary and capricious action." *Pl. Memo. In Supp. of Summ. Jmt.*, at 31 (quoting *Catholic Medical Center of Brooklyn and Queens v. N.L.R.B.*, 589 F.2d 1166, 1174 (2d Cir. 1978)). But, unlike the cases plaintiffs cite, the Boards do not change the

substantive rules of decision without explaining why. Cf. *Steege v. Defense Investigative Service*, supra, 717 F.2d at 1406-07 (agency ignored its rule making attorneys' fees available to successful complainants, without explaining why); *McHenry v. Bond*, supra, 668 F.2d at 119 (agency ignored its medical rule regarding treatment of amnesia episodes, [*1581] without explaining why). Where, as here, the agency's statutory mission is to balance equitable factors in case-by-case review, the rule of administrative stare decisis, such as there is one, n16 is satisfied where the agency applies identical standards to each case. n17

- - - - -Footnotes- - - - -

n16 In addition to conflicting Supreme Court decisions on the question whether agencies are generally bound by the rule of stare decisis, scholarly commentary has treated the question as unsettled. See, e.g., Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921, 947-52 (1965); Davis, *Administrative Law Treatise*, supra, @ 20.12, at 44-45; K. Davis, *Revising the Administrative Procedure Act*, 29 Administrative Law Review 35 (1976); R. Davis, *The Doctrine of Precedent As Applied to Administrative Decisions*, 59 West Va.L.Rev. 111 (1957). [**43]

n17 Plaintiffs argue that unless the defendant Boards are bound by prior interpretations given to discharge standards, no sufficient measure of consistency or fairness can be ensured. Yet, in characterizing each equitable application of a standard as a binding precedent, the plaintiffs would effectively collapse the distinction between the "traditional mold of judicial decisionmaking," in which each decision constitutes a rule of law, and "(equity) type judgment[s]" that involve "a synthesis of facts and personal observation filtered through the experience of the decisionmaker." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 8, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979). I therefore reject this characterization.

- - - - -End Footnotes- - - - -

Second, as Professor Davis notes, the rule regarding agency precedents has been extended only to agencies taking "formal action" under the APA. Davis, supra, @ 20.11, at 37. The discharge Boards here, however, are made expressly exempt by APA @ 554(a) from the requirements of formality embodied in @@ 556 and 557. See *Nicholson v. Brown*, 599 F.2d 639 (5th Cir. [**44] 1979). n18 Thus, while I hold that the requirement that the Boards apply uniform standards, subject to judicial review, provides a guarantee of consistency sufficient to satisfy the requirements of the APA without eliminating the Boards' discretion altogether, I note that where informal action is concerned, little consistency has been required by courts in the first instance -- let alone the obligatory rule of distinctions sought by plaintiffs here. n19

- - - - -Footnotes- - - - -

n18 In light of the Act's exemption of the Boards from the requirements of formality, plaintiffs' reliance on @ 557(c) is puzzling and plainly misplaced.

n19 Indeed, Professor Davis notes that probably ninety-nine percent of all administrative action, much of which is informal, is not regarded as having precedential value. Davis, supra, @ 20.12, at 44. Determinations by "high volume" agencies like the Immigration and Naturalization Service and the

Social Security Administration are almost never accorded precedential value. *Id.* at 31-33. Such a circumstance may owe to the administrative burden that would be created by requiring such decisionmakers to consider and distinguish past decisions. The defendants in the present action assert that the rule plaintiffs seek would cost \$2.5 million to implement in the Navy alone. *Aff. of Capt. Charles Clark*, at 2.

- - - - -End Footnotes- - - - -
[**45]

C. The Due Process Claim

Plaintiffs next argue that the Due Process Clause of the Fifth Amendment requires the Boards to provide the distinctions they seek.

In order to invoke the protections of due process in the first instance, a party must demonstrate a "legitimate claim of entitlement" to the right he claims. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). This source of entitlement may be shown "by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding -- that [show that] particularized standards or criteria guide the . . . decisionmakers." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 69 L. Ed. 2d 158, 101 S. Ct. 2460 (Brennan, J., concurring). Plaintiffs claim that the uniform standards guiding Board decisions satisfy this requirement and trigger the protection of due process. I agree. Unlike the state system at issue in *Dumschat*, *supra*, -- upon which defendants rely -- which accorded Connecticut authorities "unfettered discretion", *id.* at 466, in deciding whether to commute an inmate's prison sentence, the federal discharge review process plainly [**46] obliges defendants to utilize specified criteria [*1582] and to grant a discharge where these criteria indicate that it would be "equitable" to do so. I hold this sufficient to create a protected entitlement and to trigger the inquiry whether any further process is due.

I reject the claim, however, that the defendants owe plaintiffs procedural protections in excess of those already afforded. "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.' " *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). In determining whether further process is required in a given situation, the court must balance (1) the private interest to be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of adding further safeguards; and (3) the government's interest, including the function involved and the financial burdens imposed by addition or substitution of the procedures sought. *Mathews v. Eldridge*, 424 [**47] U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

In light of the extensive procedures already afforded plaintiffs, the existing requirement that Boards explain the basis of their decisions and respond to all issues raised by citations to past cases, and the considerable cost involved in implementing the strict rule of distinctions sought by plaintiffs, see note 19, *supra*, as well as the fact that, given the existing framework, compelling the Boards explicitly to parse factual distinctions would do little "to minimize the risk of erroneous decisions," *Greenholtz*, *supra*, at 13, I conclude that the Constitution does not require the Boards to adopt the

highly formalized rule of distinctions sought by plaintiffs. n20

- - - - -Footnotes- - - - -

n20 Indeed, the rigid rule plaintiffs seek would be especially inappropriate where, as here, the DRBs process over 20,000 applications a year; the DRBs are comprised of non-lawyers; the membership of the panels is continually changing; the proceedings are traditionally nonadversarial; and many veterans appear pro se or with non-lawyer counsel and might be severely disadvantaged were the review process reformed to resemble that of a court. See generally Defendants' Exhibits 17-20 (affidavits of DRB and BCMR officers describing the above features of the discharge review process).

- - - - -End Footnotes- - - - -

[**48]

IV. CONCLUSION

Judgment is granted as follows. The complaint of VEVA is dismissed for lack of standing and the complaint of the Army plaintiffs is dismissed for failure to exhaust administrative remedies.

There being no genuine issue of material fact with respect to the defendants' obligation to implement the rule sought by plaintiffs, I grant summary judgment to the defendants. This judgment shall in no way prejudice the right of each individual plaintiff to seek judicial review of his adverse Board decision.